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CURRENT EVENTS.

SOMETHING TOO MUCH OF THIS.—In the case of *Williams v. County Court of Grant County*,[1] the question for decision was, whether a bill in equity would lie to enjoin the collection of a dog tax. The report of the case is forty-six pages in length, and the opinion of the court (written of course by Mr. Justice Green) is forty-one pages in length. We are tempted to exclaim with the *Wheeling Inteligencer*, "How long, oh judge, how long?" Of course the opinion is "exhaustive"; it will exhaust any body to read it, and therefore we believe we will put it into the waste basket.

THE REMOVAL OF TERRITORIAL JUDGES.—While the question of the suspension of civil officers by the president is under consideration by the senate, it might be well to direct public attention to the question of the power of the president to remove territorial judges. The power was inaugurated by president Polk and has been exercised by every president from that day to this. Mr. Cleveland has exercised it in a case so conspicious as to attract public attention. Until the passage of the Revised Statutes of the United States each one of the territories was governed by a sort of constitution furnished by Congress, called its "Organic Act." Most of these organic acts provided in respect of the tenure of territorial offices, that the judges should hold their offices for the term of four years, but that the marshals and other ministerial officers should hold their offices during the period of four years "unless sooner removed by the president." The provisions of these organic acts have been consolidated in the Revised Statutes of the United States, and the provisions to which we refer will be found in Chapter One of Title XXIII, "The Territories." Each of the sections relating to the appointment and tenure of office of the governor, the secretary, and the marshal recites that he "shall hold his office for four years, and until his successor is appointed and qualified, unless sooner removed by the president."[2] But the section which provides for the appointment of the territorial judges simply recites that "they shall hold their offices for four years, and until their successors are appointed and qualified;"[3] thus neither conferring nor recognizing the power of removal by the president. The provision "until their successors are appointed and qualified" exists in most American statutes relating to the tenure of office, and is universally understood to mean that the incumbent shall continue to hold the office *after the expiration of his term*, until his successor is duly appointed (or elected) and qualified, thus preventing an interregnum, so to speak, in the office.[4] There seems to be a clear purpose manifested in the distinction which the statute thus makes between the tenure of judicial and ministerial offices to make the tenure of the judicial offices extend over a definite period. This being the state of the law, if the president possesses the power to remove territorial judges, where does he get it? Does he get it from the Tenure of Office Act? Clearly not, because that is a general law, and upon familiar principles of statutory interpretation, would have no effect where there is a special or local statute making a special provision, the maxim applicable in all such cases being *generalia specialibus non derogant*.

MORE ABOUT THE REMOVAL OF TERRITORIAL JUDGES.—Our readers must be careful to understand that we are not stirring a party question. We are not publishing a political paper, and this is a question which rises entirely above the exigencies of party politics. Ten years ago in these columns, when Gen. Grant was president, we spoke of the practice in the following language: "The very existence of such a power, and the possibility that it may at any time be arbitrarily exercised, must necessarily have a tendency to destroy the independence of the judges, to

[1] 26 W. Va., 488 (advance sheets).

[2] Rev. Stat. U. S., §§ 1841, 1843, 1876.

[3] Ibid, § 1864.

[4] *Ex parte* Lawhorne, 18 Gratt. 85; People v. Lord, 9 Mich., 227. Compare Stratton v. Oulton, 28 Cal., 44; People v. Stratton, Id., 382; Cordiell v. Frizell, 1 Nev., 130; People v. Tieman, 8 Abb. Pr., (N. Y.) 359.

degrade them and to corrupt their integrity. Our ancestors have recognized this fact, than which none is better established in English history; and, accordingly, one of the fundamental principles of the British and of all the American constitutions is that the judges shall not be subject to the power of removal except for incompetency or misbehavior, which fact must first be determined in a judicial proceeding. It follows that when the power to remove a judge is exercised without clear warrant of law, it involves a vital attack upon one of the most cherished safeguards of free government, and deserves no less than impeachment."[5] We were then denouncing the act of President Grant in removing two territorial judges of Colorado. The removal was attended with scandal, and was of itself calculated to break down the independence of the judiciary in all the territories, and to destroy all confidence in the integrity of the territorial courts. We recurred to the same subject later during the same year and took occasion to refer to it in the following language: "We said at the time, and we still believe, that such conduct on the part of the executive, done in violation of the terms of a positive statute—conduct directly calculated to break down the independence of the judiciary—deserves the severest reprobation. Further, it has been charged in our hearing that the removal of these two judges, and the appointment of others in their stead, was done to subserve the purposes of certain particular litigation. Whilst it would be unjust to give credence to general charges of this character, which from their very nature are neither susceptible of proof or disproof, yet the fact remains that where an officer acts in direct violation of the law no presumption of correct motives attends his conduct."[6] We have not had any occasion to change these views during the subsequent ten years. What was true then of President Grant is true now of President Cleveland, and what was wrong in the former is wrong in the latter.

THE REMOVAL OF TERRITORIAL JUDGES UPON CHARGES AND WITHOUT A HEARING.—If the power to remove territorial judges is exercised upon the ground that such a judge holds his office by the same tenure as a postmaster, and that the president can remove him at pleasure to make room for one of his own partisans, or for any other reason which may seem fit to him; if, in other words, the judges appointed to administer justice over those citizens of the United States who are so unfortunate as to reside and own property in the territories are, in respect of the president, merely the employees of an employer or the servants of a master,—then the act of the president in removing one judge before the expiration of his term of office and in appointing another to fill his place, does not necessarily involve an imputation upon the character or official conduct of the judge who is thus removed. But what should be said of the act of removing such an official upon a public charge of official delinquency and without allowing him an opportunity of being heard? It is one of the fundamental principles of Anglo-American jurisprudence that no man shall be condemned unheard. That principle is written in Magna Charta, in the Constitution of the United States, and in the constitution of every one of the States. The president is a lawyer, and, though not an eminent one, is yet lawyer enough to know that such a principle exists. Now, he removes one of his own appointees, a judge of the territorial court of New Mexico, on the charge of official malversation in appointing a certain man to be a jury commissioner of his court. That charge may or may not have been a good reason why the judge should not have longer continued to hold the office. We will suppose that it was such a reason. Nevertheless, the charge was made; the opportunity of being heard in explanation was denied; the removal was summary, and the removed and disgraced official, a young man at the outset of his career, has been begging for a hearing ever since. And this has taken place in America, and American public opinion has justified it, and the opinion of the legal profession is such that not a single lawyer has raised his voice against it. President Cleveland has done many things to justify the confidence of the people; but we say without bated breath, and speaking wholly without reference to party politics, that this was a flagrant piece of usurpation, unjust and un-American, for which his administration ought to be held to answer before the bar of public opinion.

[5] 2 Cent. L. J., 341.
[6] 2 Cent. L. J., 825, 826.

NOTES OF RECENT DECISIONS.

WILL. [CHILDREN IN VENTRE SA MERE.] WHEN DEVISE TO CHILDREN INCLUDES CHILD IN VENTRE SA MERE.—In *Randolph v. Randolph*,[7] lately decided in the New Jersey Court of Chancery, it appeared that a testator had provided in his will that a certain sum of money should be set apart for each of his grandchildren, *living at the time of his decease.* This clause was held by Chancellor Runyon to include a grandchild born two days' after the testator's decease. To this decision Mr. John H. Stewart, the learned reporter, appends the following note: "A devise to children living at the time of A's decease was held to include a posthumous child of A.[8] So, of a devise to A.'s children, who should be living at A.'s death, and one child was born before A.'s death, and one afterwards.[9] So, of a devise to J., in case he should leave no son at the time of his (testator's) death, and a son was born after testator's death.[10] So, of a bond to pay £900 to the obligor's daughter, in case he should have no son living at the time of his decease, and a son was born after his decease.[11] So, on a bequest to each and every of testator's children born, or thereafter to be born, and who should be living at the time of his death, with interest to be computed from the day of testator's death, the interest was allowed a posthumous child only from the day of its birth.[12] So, of a bequest 'to each child that may be born to either of the children of either of my brothers, lawfully begotten.''[13] So, of a devise for life to H., remainder to his first son in tail male, etc.[14] So, of an executory devise.[15] A gift 'to each of the three children of my niece' will not embrace a fourth and posthumous child.[16] The same construction has been given in the case of a devise to grandchildren living at a designated time.[17] The same construction has been given in the case of a devise to grandchildren living at a designated time.[17] But a devise to great-grandchildren was held not to include a great-grandchild *in ventre sa mere* at the testator's death.[18] A gift was to C. for life, and afterwards to his children then living. C. was unmarried, but had illegitimate children living when the will was executed, of which fact it was assumed the testator was cognizant. *Held*, that such children were excluded.[19] A trust until the youngest of the children of donor's nephews and nieces who should be born and living at donor's death, etc., was held not to include a child *in utero*.[20]

[7] 40 N. J. Eq., 74.

[8] Whitelock v. Hedden, 1 B. & P. 243; Hale v. Hale, Finch, 50; Northey v. Strange, 1 P. Wms. 340; Clarke v. Blake, 2 Bro. C. C. 320, 2 Ves., Jr., 673, 2 H. Bl. 399; Trower v. Butts, 1 S. & S. 181; Crook v. Hill, L. R. 3 Ch. Div. 773, 778; Groce v. Rittenberry, 14 Ga. 232; Barker v. Pearce, 30 Pa. St. 173; Laird's Appeal, 85 Pa. St. 339; Bedon v. Bedon, 2 Bail. 231; Pearson v. Carlton, 18 S. C. 56. *Contra*, Musgrave v. Parry, 2 Vern. 710; Cooper v. Forbes, 2 Bro. C. C. 63; Bate v. Amherst, T. Raym. 83; McKnight v. Read, 1 Whart. 213; Starling v. Price, 16 Ohio St. 29; Burke v. Wilder, 1 McCord's Ch. 551. See Sprackling v. Ranier, 1 Dick. 344; Gardiner's Estate, L. R. 20 Eq. 647; *In re* Corlass, L. R. 1 Ch. Div. 460; Armistead v. Dangerfield, 3 Munf. 20; and, also, Harper v. Archer, 4 Sm. & Marsh. 99; 43 Am. Dec. 472.

[9] Beale v. Beale, 1 P. Wms. 244. See Hyde v. Seymour, 1 Freem. Ch. 42.

[10] Burdet v. Hopgood, 1 P. Wms. 486; Pearce v. Carrington, L. R. 8 Ch. App. 969.

[11] Gibson v. Gibson, 2 Freem. Ch. 223; 2 Eq. Cas. Abr. 769; Millar v. Turner, 1 Ves., Sr. 85. See Godfrey v. Davis, 6 Ves. 43.

[12] Rawlins v. Rawlins, 2 Cox, 425. See *In re* Mowlem, L.R. 18 Eq. 9.

[13] Townsend v. Early, 3 De G., F. & J. 1.

[14] Reeve v. Long, 1 Salk. 228; Crisfield v. Stow, 36 Md. 129; Stedfast v. Nicoll, 3 Johns. Cas. 18; Watkins v. Flora, 8 Ired. 374, 13 Ired. 344; Smith v. McConnell, 17 Ill. 141. See McKnight v. Read, 1 Whart. 213; Gillespie v. Schuman, 62 Ga. 252; Gulliver v. Wickett, 1 Wils. 105.

[15] Luddington v. Kime, 1 Ld. Raym. 207.

[16] Emery's Estate, L. R. 3 Ch. Div. 300. But see Goodfellow v. Goodfellow, 18 Beav. 356; Spencer v. Ward. L. R. (9 Eq.) 507; Daniell v. Daniell, 3 De G. & Sm. 337; Early v. Middleton, 15 Jur. 867.

[17] Hall v. Hancock, 15 Pick. 255; Hone v. Van Schaick, 3 Barb. Ch. 488, reversed, 3 N. Y. 538; See Loockerman v. McBlair, 6 Gill, 177; Swift v. Duffield, 5 Serg. & R. 38; Smart v. King, Meigs, 149.

[18] Freemantle v. Freemantle, 1 Cox, 248.

[19] Warner v. Warner, 15 Jur. 141.

[20] Blossom v. Blossom, 10 Jur. (N. S.) 1113, 2 De G., J. & S. 665, reversing 10 Jur. (N. S.) 165. As to a testamentary provision in favor of a child *in ventre*, see Earle v. Wilson, 17 Ves. 528; Medworth v. Pope, 27 Beav. 71; Blakiston v. Haselwood, 15 Jur. 272, 10 C. B. 544; *In re* Lindsay, 5 Irish Jur. 97.

[21] 7 Ky. Law Rep. 317.

THE ACCOUNT STATED.

The doctrine of account stated, or *insimul computassent*, illustrates both the old conservatism of the law merchant and the extending influence of modern trade and commerce. In its technical characteristics it is a law doctrine, but it often shines with the lustre of equity. In its development, it shows the power of that broad rule of application which continually enlarges the scope of a law because no reason obtains against it, and this exhibits both the multiplicity of modern demands and the constant tendency of equity to follow them.

The Old Doctrine.—An express settlement upon differences has of course always been held binding upon the parties thereto. But the peculiar feature of the account stated, that an account rendered and held without objection becomes stated by acquiescence, was originally limited to transactions between merchants. And it is a question whether the old reasoning may not be better entitled to respect than the more lax logic of modern times. Among merchants, accounts are supposed to be closely looked after at frequent intervals, but among business classes not mercantile debits and credits are mutually passed and bills rendered with a degree of attention depending largely upon the occupation of the parties. Thus a physician sends bill for services, to a client, or a lawyer, or a publisher to his subscriber, or a retiring clerk or employee to his master, or a seamstress to her mistress;—it is received with mental objections while other duties crowd it out of mind; yet it may be totally incorrect, and will not be questioned unless for considerable error, or for fraud or mistake. The merchants deal with accounts daily, the other class only occasionally. The old rule, therefore, may be most consistent with reason, that the doctrine that where an account is rendered and received without objection for a reasonable length of time, it becomes an account stated, is applicable only as between merchants. This was the rule in Lord Hutchin's time, who said in Sherman v. Sherman,[1] in 1692, "among merchants it is looked upon as an allowance of an account current if the merchant that receives it does not object against it in second or third post." In Willis v. Jernegan[2] Lord Hardwicke stated the rule substantially the same. These cases seem to be directed to mutual dealings and between merchants of different countries. So Chancellor Kent, in Murray v. Toland,[3] remarked: "It has been often held, that if a party receives a stated account from abroad and keeps it by him for a length of time (one case says two years,) without objection, he shall be bound by it," citing Tickel v. Short in which Lord Hardwicke had used the expression, "two years." And in Freeland v. Heron Lenox & Co.[5] the United States Supreme Court referred to the doctrine as "a rule of the chancery court and of merchants," stating it thus: "When one merchant sends an account current to another residing in a different country, between whom there are mutual dealings, and he keeps it two years without making any objections, it shall be deemed a stated account, and his silence and acquiescence shall bind him, at least so far as to cast the *onus probandi* on him." From these cases it thus appears that the old rule required, in order to transform an account current into to an account stated, that the dealings be mutual, among merchants, and that the modern phrase "a reasonable time" for objection, be conformed to the then existing means of communication. And so far, at least, as its limitation to transactions between merchants is concerned, the doctrine has received similar exposition in some of the state courts[6].

The Modern Doctrine:—The weight of modern authority, however, supports a wider application. Wharton applies it to "business[7] men." In Shephard v. Bank of Missouri[8] it is said there is no reason why acquiescence or silence should not apply in accounts rendered by other than merchants, and in White

[1] 2 Vern., 276.

[2] 2 Atk., 251.

[3] 3 Johns. Ch., 569.

[4] 2 Ves., 259.

[5] 7 Cranch, 148.

[6] McCall v. Nave, 52 Miss. 494, 498; Stebbins v. Niles, 25 Id. 348; Townes v. Birchett, 12 Leigh, 173; Robertson v. Wright, 17 Gratt, 534, 541; Cowen & Hills notes to Phillips on Ev., note, 191. But see Anding v. Levy, 57 Miss. 51.

[7] 2 Ev., § 1140.

[8] 15 Mo., 141.

v. Campbell,[9] the old rule is stated, but the application is enlarged. Thus is the modern doctrine.

The Definition:—"The real account stated," said Blackburn in an old case, "called *insimul computassent*, is where several items of charges are brought into account on either side and being set one against another a balance is struck, and the consideration for the payment of the balance is the discharge of the items on each side. It is then the same as if each item was paid, a discharge given for each, and in consideration of that discharge the balance agreed was due.[10]" The baldest definition is "an agreement between the parties that the items of an account are true."[11] This appears to be more properly the definition of an account settled, although there is little practical difference between the two. In Baxter v. the State,[12] the court say: "The word 'settle' has an established legal meaning, and implies the mutual adjustment of accounts between different parties, and an agreement upon the balance." Similar definitions run through all the authorities, except that in some, the doctrine seems to require mutuality of dealings,[13] which is not required in others.[14] The weight of authority excludes this requirement; the items may all be on one side,[15] or there may have been but one transaction,[16] and the character of the parties (as against the old rule) is immaterial[17] if they they are capable of contracting.[18]

The Elements:—With these definitions go the explanations of the terms employed.

1. There must be an agreement between the parties based upon examination of the transactions embraced, either actual or presumptive.[19] It follows that mere admissions not strong or pertinent enough to constitute an agreement, will not sustain an account stated,[20] nor a qualified acknowledgment[21] or admission, nor an acknowledgement wrongfully obtained or not intended,[22] nor acceptance by one not duly authorized thereto.[23] This essential of agreement, it is to be remembered, is required to constitute an account stated in the first instance, as distinguished from the operation of fraud, error and mistake after an account has become stated. An account may become technically stated notwithstanding these stains, if the necessary agreement be present, if absent, it can never be, for an account stated is in the nature of a new contract;[24] but not, if unsigned, to save the original transactions from the statutes of limitations.[25]

2. The agreement or promise need not be written;[26] and, if written, the form is immaterial so long as it will support an agreement; and it need not be express,[28] as the gist of the transaction is unqualified acceptance of the account as correct, for objection to one item may imply acquiescence in the balance.[29] As

[9] 25 Mich., 463.

[10] To the same effect, Langdon v. Roane's Admr., 6 Ala. R. 578.

[11] Stebbins v. Niles, 25 Miss. 267.

[12] 9 Wis., 39.

[13] Abbott's Trial Ev., p. 458.

[14] Kock v. Bonitz, 4 Daly. 177; Knowles v. Michell, 13 East, 249; Hutchinson v. Market Bank of Troy, 48 Barb. 302.

[15] Kock v. Bonitz, 4 Daly, 117; Knowles v. Michael, 13 East, 249; Hutchinson v. Market Bank of Troy, 48 Barb. 302; Cobb v. Arundell, 26 Wis. 553; Laycock v. Pickles, 4 B. & S. 497; Ashley v. Ashley, 3 Moo. & A. 186; Porter v. Cooper, 6 C. M. & R. 294.

[16] Highmore v. Primrose, 5 M. & S. 67.

[17] Lockwood v. Thorne, 11 N. Y. 170—tanner and leather merchant; Stenton v. Jerome, 54 N. Y. 480—stockbroker; Case v. Hotchkiss, 1 Abb. 324—attorney; Towsley v. Dennison, 45 Barb. 490—stone-vendor; Terry v. Sickles, 13 Cal. 427; Thorp v. Thorp, 15 Vt. 105.

[18] Holmes v. D'Camp, 1 Johns. 34; Trueman v. Hurst, 1 Term R. 40 (infant); Southwick v. Southwick, 1 Sweeny (N. Y.), 47 (as against wife in favor of husband); Tarbuck v. Ispham (infant), 2 M. & W 7.

[19] Reinhardt v. Hines, 51 Miss. 344; Cape Girardeau, etc. R. R. Co. v. Kimmel, 58 Mo. 83; Stenton v. Jerome, 54 N. Y. (9 Sick.) 480; Robertson v. Wright, 17 Gratt. 534; Chatham v. Niles, 36 Conn. 420; Volkening v. De Graaf, 81 N. Y. 268.

[20] Kirtan v. Wood, 1 Mood. & Rob. 253; Lane v. Hill, 18 Ad. & El. (N. S.) 252; Wayman v. Hilliard, 7 Bing. 101; Morton v. Rogers, 14 Wend. 576; Breckon v. Smith, 1 Ad. & E. 488; Bernaseoni v. Anderson, 1 M. & M. 183.

[21] Evans v. Verity, Ryan & M. 239; Rosc. N. P. 588.

[22] Tucker v. Barron, 7 B. & C. 623; Stenton v. Jerome, 54 N. Y. 480.

[23] Rosc. N. P. 589; Thallimer v. Brinckerhoff, 4 Wend. 394; Grant v. Franco-Egyptian Bank, Eng. Ct. App. 1877.

[24] Holmes v. D'Camp, 1 Johns. 34; Montgomery v. Ives, 17 Johns. 38; Hoyt v. Wilkinson, 10 Pick. 31; White v. Campbell, 25 Mich. 463.

[25] Chace v. Trafford, 116 Mass. 529.

[26] Freeman v. Howell, 4 La. Ann. 196; St. Mary's Church v. Cagger, 6 Barb. 576; Bruen v. Hone, 2 Barb 586; Brown v. Vandyke, 8 N. J. Eq. (4 Halst.) 795.

[27] Montgomery v. Ives, 17 Johns. 38; Fesenmayer v Adcock, 16 Mees. & W. 449; Hoyt v. Wilkinson, 1 Pick. 33.

[28] Stebbins v. Niles, 25 Miss. 267.

[29] Rosc. N. P. 590.

said in White v. Hampton, the acquiescence of the parties must depend upon the special circumstances of each case.[30] In partnership matters, however, the courts are divided on the question as to whether, in an accounting, the promise to pay the balance must be express. The old English rule held it to be necessary,[31] and this is followed in some of the States.[32] The contrary is now the English rule,[33] and in others of the States,[34] in which a final balance struck takes the place of an express promise, while in still other courts an arrangement as to specific things is held conclusive between the parties.[35] It is hardly necessary to add that where there is no original liability between the parties an account stated, alone and as such, will not be binding.[36]

3. And hence it is, that the great majority of the cases cover simple rendition of accounts followed by failure to object thereto. In these the necessary agreement is implied from all the circumstances, in particular the failure to dissent from the account, and it is here the old rule has been vastly enlarged by embracing every kind of transaction in which the relation of debtor and creditor is involved. As said in Toland v. Sprague:[37] "The mere rendition of an account does not make it a stated one, but if the other party receives the account, admits the correctness of the item, * * then it becomes a stated account." And the court did not think it important that "the account was not made out as between the plaintiff and defendant," but "the plaintiff having received it," and having made no complaint as to the items or the balance, * * thereby accepted it, and by his own act treated it as a stated account." This is the settled rule in every case where the parties are competent, authorized to act and not imposed upon through ignorance or by fraud, that an account rendered and not objected to within a reasonable time is to be regarded as admitted, by the party charged, to be *prima facie* correct.[38]

Illustrations:—The illustrations are numerous. Thus, where one sends by mail a statement of account to another with whom he has dealings, which is received, but not replied to within a reasonable time, the acquiescence of the party is taken as an admission of its correctness.[39] So where a creditor presented an account to his debtor, who corrected some of the items, it became an account stated as to items not objected to, binding upon the debtor's representatives.[40] So the balancing and return of a pass book has the effect of an account stated.[41] So an account of advances rendered by an agent to his principal and not objected to by the latter.[42] So where a depositor had been in the habit of checking out his deposits shortly after placing them, and was notified of a balance long after he supposed he had exhausted his account, and drew it without inquiry, but two years after brought action for an alleged balance, it was held that his course in drawing was evidence of acquiescence in an account stated.[43] In short, any circumstances showing assent to creditor's specific claim are sufficient. As where a creditor received goods from his debtor to sell and to apply the proceeds on the debt, and after such sale and application, admitted a balance due in return to the debtor, there was an account stated on the balance.[44] And where the plaintiff lent money to A. on B's promise to become surety, and A. and B. signed a memorandum: "We jointly and

[30] 10 Iowa, 238.

[31] Fromont v. Coupland, 2 Bing. 170.

[32] Halsted v. Schmelzel, 17 Johns. 80; Townsend v. Goewey, 19 Wend. 424; Chadsey v. Harrison, 11 Ill. 151; Wycoff v. Purnell, 10 Iowa, 332; Buell v. Cole, 54 Barb. 353; 4 Abb. N. Y. Digest, new ed. 736; Rosc. N. P. 590.

[33] Rackstraw v. Imber, Hall's N. P. 368; Henley v. Soper, 8 B. & C. 16; Wray v. Milestone, 5 M. & W. 21.

[34] Pope v. Randolph, 13 Ala. 214; Spear v. Newell, 13 Vt. 288; Ross v. Carnell, 45 Cal. 133; Buell v. Cole, 54 Barb. 353.

[35] Jackson v. Stopherd, 2 Cromp. & M. 361; Coffee v. Brian, 3 Bing. 54; Carr v. Smith, 5 Q. B. 128; Gibson v. Moore, 6 N. H. 547; Clark v. Dibble, 17 Wend. 603; Bryd v. Fox, 8 Mo. 574.

[36] Porter v. Lobach, 2 Bosw. (N. Y.) 188; Spangler v. Springer, 22 Pa. St. 454; Kennedy v. Brown, 13 C. B. (N. S.) 677; Melchoir v. McCarty, 31 Wis. 253; Frey Fond du Lac, 24 Id. 204.

[37] 12 Peters (U. S.), 335.

[38] Wiggins v. Burkham, 10 Wall. 129; Harris v. Ely, Seld. notes Dec. 1852; Allen v. Stevens, 1 N. Y. Leg. Obs. 359; Atwater v. Fowler, 1 Edw. 417; Phillips v. Belden, 2 Edw. 1; Daws v. Durfee, 10 Barb. 213; Murray v. Toland, 3 Johns. Ch. 569.

[39] Bailey v. Bensly, 87 Ill. 556.

[40] Sergeant v. Ewing, 36 Pa. St. 156.

[41] Schneider v. Irving Bank, 1 Daly, 500; Hutchinson v. Market Bank, 48 Barb. 302; Marye v. Strause, 6 Sawyer C. Ct. 204.

[42] Mertens v. Nottebohms, 4 Gratt. (Va.) 163, 168, 173.

[43] American Bank v. Bushey, 45 Mich. 135.

[44] Howard v. Brownhill, 23 L. J. O. B. 23.

severally owe you £60." [45] And where one took possession of premises to which were attached fixtures, and agreed to valuation of the same.[46] And a setoff in account stated is equal to payment.[47] But a bill rendered covering several items but expressing a lump sum due for services, does not preclude the creditor from recovering more than he had so charged.[48] Nor will an illegal claim support an account stated.[49] Nor will retention of account containing an item of loan to a third person for whom the party receiving the bill was not responsible be held as acquiescence.[50] And it is held in White v. Campbell[51] that the rule of acquiescence ought not to be applied in favor of a party where he claims that the statute of limitations began to run from the time of rendering the account.

Trial Questions:—Where there is no dispute as to the circumstances claimed to constitute a stating of the account and as to the time elapsing before objection, a question of law simply is of course raised; but otherwise the question is one of law and fact, and for the jury.[52] Direct evidence of objection repels evidence of assent.[53] And it may be shown that assent was inconsiderately given.[54] But not that defendant was not of sufficient capacity to comprehend long accounts,[55] unless there was undue influence or fraud.[56] Accounting in particular character is admission of the same.[57] But while formerly an account stated was held conclusive,[58] it is now universally regarded as *prima facie* only, and not an estoppel,[59] unless upon a deliberate settlement, mutual compromises have been made, as where a balance is struck after hearing by referees,[60] or where a party stated an account which he sent to the other by a messenger, with his check for the balance, the party obtaining the money on the check was held by the acceptance.[61]

Opening the Account:—Since an account stated, as distinguished from a deliberate settlement, is not an estoppel, it may be opened for sufficient cause. After examination of accounts, the balance is principal, and the items cannot be again inquired into,[62] except as below, nor will counter-claim be allowed arising from the items embraced in the account as stated or connected therewith under the rules governing counter-claims.[63] But it is universally settled that fraud, error and mistake constitute grounds for opening,[64] except as stated below. Fraud vitiates all contracts. Error is perhaps rather a reason for correcting the final result of a stating than a ground for opening the account, for a mistake in footing may be ascertained by a correct footing.[65] Mistakes generally will invoke the aid of the court in re-examining the items, and will let in corrections on both sides,[66] and the courts are more lenient where the parties have sustained confidential relations,[67] but a clause stating that the matter is subject to errors subsequently arising, does not, probably, render it less subject to the rules of the stated

[45] Buck v. Hurst, L. R. 1 C. P. 297.

[46] Salmon v. Watson, 4 Moore, 73.

[47] Livingstone v. Whiting, 15 Q. B. 722.

[48] Williams v. Glenny, 16 N. Y. 389. See Romeyn v. Campan, 17 Mich. 327.

[49] Kennedy v. Brown, 13 C. B. (N. S.) 677.

[50] Porter v. Lobach, 2 Bosw. (N. Y.) 188; Spangler v. Springer, 22 Pa. St. 454.

[51] 25 Mich., 463.

[52] Wiggins v. Burkham, 10 Wall. (U. S.) 129. See Lockwood v. Thorne, 11 N. Y. (1 Kern.) 170; Davies v. Tiernan, 3 Miss. (2 How.) 786.

[53] Cobb v. Arundell, 26 Wis. 553; Guernsey v. Rexford, 63 N. Y. 631.

[54] Stewart v. Conner, 13 Ala. 94.

[55] Stewart v. Conner, *supra*.

[56] Abbott's Trial Ev., p. 462.

[57] Peacock v. Harris, 10 East. 104.

[58] Bartlett v. Emery, 1 Term. R. 42, note.

[59] Holmes v. D'Camp, 1 Johns. 36; Wilson v. Wilson, 14 Com. B. (5 J. Scott.), 626; Thomas Admr. v. Hawkes, 8 M. & W. 140· Abbott's Trial Ev. 458.

[60] Clark v. Fairchild, 22 Wend. 576; See Martin v. Beckwith, 4 Wis. 219; Cogswell v. Whittlesey, 1 Root. 384; Knox v. Whalley, 1 Esp. R., 159; Dawson v. Remnant, 6 Id. 24; Spraunce v. Rogers, 12 Mod. R., 517; Sanderoft v. Dempsy, 15 Wend., 83; Bruen v. Hone, 2 Barb., S. C. R., 586.

[61] Davenport v. Wheeler, 7 Cow. 231.

[62] McClelland v. West, 70 Penn. St. 183.

[63] Gilchrist v. Brook., Groc. Man. Ass., 66 Barb. 390; affirmed in 59 N. Y., 495; See Russell v. Owen, 61 Mo., 185; Hunt v. Holmes, 16 Bank. Reg., 101.

[64] Farnam v. Brooks, 9 Pick. 212; Roberts v. Totten, 13 Ark. 609; Rembert v. Brown, 17 Ala. 667; Bankhead v. Alloway, 6 Coldw. (Tenn.), 56: Chatham v. Niles, 36 Conn. 403; See Trobe v. Hayward, 13 Fla. 190; Shirk's Appeal, 3 Brewst. (Penn.), 119; Kronenberger v. Binz, 56 Me. 121; Branger v. Chevalier, 9 Cal. 353; Goodwin v. U. S. Ins. Co., 24 Conn. 591; McDougall v. Cooper, 81 N. Y. (4 Tiff.) 498; Williamson v. Barbour, L. J. 9 Ch. Div. 529; Wiggins v. Bursham, 10 Wall. 129; Perkins v. Hart, 11 Wheat. 256.

[65] Walling v. Rosevelt, 1 Harr. 41.

[66] Floyd v. Priester, 8 Rich. Eq. (S. C.), 248.

[67] Young v. Hill, 67 N. Y., 162, rev'g 6 Hun, 613; but see Philips v. Belden, 2 Edw. Ch. 1, 17, and Ogden v. Astar, 4 Sandf., 336.

account.[68] Proof of fraud will open the entire account, but courts will proceed slowly after the operation of the statute of limitations,[70] while proof of error and mistakes will simply leave to the party showing them to surcharge or falsify the account,[71] and he assumes all burdens and must proceed affirmatively.[72] To surcharge the account is to add omitted items.[73] To falsify is to correct erroneous items.[74] In either case the account remains stated except as to items to be added or corrected.[75] Usurious charges will be corrected,[76] except after long delay, as in one case two years.[77] But there is no generosity in the doctrine. 'When an account is settled by the parties themselves, and there is no unfairness, and all the facts are equally well known to both sides, their adjustment is final and conclusive.''[78] The rule permitting an opening, surcharging or falsifying an account stated offers no encouragement to negligence or laches.[79] Thus, it has been sustained after eleven years delay in making objections,[80] twenty years of similar negligence,[81] and so for six years.[82] Indeed, when an account is technically stated, the courts are slow to open it, and require very strong and conclusive evidence before giving aid.[83] So for mistakes of law.[84] So after other circumstances have arisen making proof difficult, as where defendant's books have been destroyed by fire,[85] or lapse of time as shown above, or death of parties,[86] or after judgment and execution,[87] or after of statutes of limitations,[88] or for unimportant error.[89]

The Pleading:—One who wishes to rely on an account stated, must plead the same, whether in complaint or answer. It is in the nature of a new promise,[90] and the pleading must allege the technical stating,[91] and the original items need not be set forth,[92] but if they are, either party may go into them.[93] Hence a plea merely of an account stated, though it avers a balance, and a promise to pay the same, is bad at common law, for it is a mere accord without satisfaction,[94] but this rule would not now hold good. An allegation that an account was rendered and not objected to is not enough,[95] nor that there was a settlement of accounts.[96] He who wishes to open, surcharge or falsify an account stated must plead his grounds.[97] An Indiana case allowed proof of errors to be let in under a general denial,[98] but the general rule is to the contrary. In another court an allegation of errors after a denial of the ac

[68] See Young v. Hill, *supra*, account stated on compound interest not recoverable.

[69] Brown v. Vandyke, 8 N. J. Eq. 795; Bruen v. Hone, 2 Barb. (N. Y.), 586.

[70] Stearns v. Page, 7 How. (U. S.), 819.

[71] Bruen v. Hone, 2 Barb. 586; Gover v. Hall, 3 Harr & J. (Md.), 43; Bullock v. Boyd, 2 Edw. Ch. (N. Y.), 293.

[72] Towsley v. Denison, 45 Barb. 490; Burke v. Isham, 3 Alb. Law Jour. 209.

[73] Wilson v. Runkel, 38 Wis. 526.

[74] Perkins v. Hart, 77 Wheat. 237, note.

[75] Story's Eq. Pl., S. 801; 1 Story's Eq. Jur., S. 523 Bruen v. Hone, 2 Barb. 586; Bullock v. Boyd, 2 Edw., 293.

[76] Bullock v. Boyd, Hoffm. 294; Phillips v. Belden, 2 Edw. 1.

[77] Seymour v. Martin, 11 Barb. 80; but see Barron v. Rhinelder, 1 John. Ch. 550.

[78] Hager v. Thompson, 1 Black. 80.

[79] Gregory v. Forrester, 1 McCord, (S.C.) 332; George v. Johnson, 42 N. H., 456; Ogden v. Astor, 4 Sand. (N. Y.) 311.

[80] Bruen v. Hone, 2 Barb. 586.

[81] Hutchins v. Hope, 7 Gill (Mo.), 119.

[82] Randel v. Ely, 3 Brewst. (Penn.), 270.

[83] Marsh v. Case, 30 Wis. 531: Wilde v. Jenkins, 4 Paige, 481; Lockwood v. Thorne, 11 N. Y. (1 Kern.), 170; Chappedelaine v. Dechenaux, 4 Cranch. 306; Clark v. Fairchild, 22 Wend. 576; Towsley v. Denison, 45 Barb. 490; McIntyre v Warren, 3 Abb. Ct. App., N. Y. 99; Herrick v. Ames, 1 Keyes, N. Y. 190; Stutphen v. Cushman, 35 Ill., 186; Dakin v. Demming, 6 Paige, 95; Kronenberger v. Binz, 56 Mo., 121.

[84] Cam v. Gherky, Wright. O., 493.

[85] Bruen v. Hone, *supra*.

[86] Winston v. Street, 2 Patt. & H., Va., 169; Dakin v. Demming, *supra*; Dexter v. Arnold, 2 Sumn. 108; Atwood v. Fowler, 1 Edw. Ch. 417.

[87] Bloodgood v. Zeilly, 2 Conies, 124.

[88] Stearns v. Page, 7 How. (U. S.), 819.

[89] Story's Eq. § 527, note.

[90] Dutcher v. Porter, 63 Barb. 15; Holmes v. DeCamp, 1 Johns. 34; Dorsey v. Kollack, 1 N. J. L. 35; But see Chase v. Trafford, 116 Mass. 529.

[91] Kock v. Bonitz, 4 Daly, 117, 120; 1 Chitty Pl. 418; Slee v. Bloom, 20 Johns., 669.

[92] Foster v. Allanson, 2 Term. R. 480; Fitch v. Leitch, 11 Leigh. (Va.) 471; Hoyt v. Wilkinson, 10 Pick. 31; Tassey v. Church, 4 Watts. & Serg., 141; 1 Steph. Pl. N. P., 362; 1 Chit. Pl. 358; Milward v. Ingram, 2 Mod. 43.

[93] Northern Line Packet v. Platt, 22 Minn. 413.

[94] Bump v. Phoenix, 6 Hill, 308.

[95] Emery v. Pease, 20 N. Y. 62; Brown v. Kimmel, 67 Mo. 430.

[96] Ward v. Farriday, 9 Mo. App. 370; But see Baxter v. The State, 9 Wis. 32.

[97] Kronenberger v. Binz, 56 Mo. 121; Threlkeld v. Dobbins, 45 Ga. 144; Abbott's Trial Ev. 463; See Perkins v. Hart, 11 Wheat. 245, note.

[98] Bounslog v. Garrett, 39 Ind. 338.

count stated was held not inconsistent pleading.[99] It would seem that the trial on account stated must stand or fall on that issue, but it is also said that the question whether proof of the original indebtedness is competent where plaintiff fails to prove the stating of the account, depends on whether defendant has been misled to his prejudice by the variance,[100] and that, if not, the pleading is amendable.[101] Even where an account stated is shown and is unimpeached, plaintiff can not always recover in the original cause of action,[102] as the foundation may be illegal or void.[103] But unless the technical account stated is expressly relied on, the parties may, it seems, fall back on the original matters.[104] Where defendant alleges account stated as a defense merely, no reply is necessary[105] under the general code provisions. It is believed, finally, that questions of evidence may be deduced from the foregoing statements, but it may be added that some courts hold the burden of proving objections made to an account rendered and held for some time to be on the defendant,[106] instead of requiring plaintiff to make out what would seem to be his whole *prima facie* case, and that the course of mails will not be judicially noticed in a question as to what is a reasonable time for objecting.[107]

Oshkosh, WIS. FRANK C. HADDOCK.

[99] Grace v. Newbre, 31 Wis. 19.
[100] Abbott's Trial Ev. 459.
[101] Woolsey v. Village of Rondout, 4 Abb. Ct. App. Dec. 639; See Grace v. Newbre, 31 Wis. 19.
[102] White v. Whiting, 8 Daly, 23, 27.
[103] See note 36.
[104] Goings v. Patten, 1 Daly, 168.
[105] Welsh v. German Amer. Bank, 42 Super. Ct. (J. & S.), 462; See 73 N. Y., 424.
[106] Tolland v. Sprague, 12 Pet. 330; Towsley v. Dennison, 45 Barb. 490; See notes above.
[107] Wiggins v. Burkham, 10 Wall. 129.

LIABILITY OF DIRECTORS FOR DECEIT.

EDGINGTON V. FITZMAURICE.*

English Court of Appeal, March 7, 1885.

DECEIT. [*Directors.*] *Liability of Directors for False Representations made to Effect Sales of Company's Debentures.*—The directors of a company issued a prospectus inviting subscriptions for debentures, and stating that the debentures were issued with the object of obtaining money to purchase horses and vans, to complete alterations in the company's premises, and to develop the business of the company. The true object of the loan was to pay off pressing liabilities. The plaintiff advanced money on some of the debentures under the erroneous belief that the prospectus offered him a charge on the property of the company. *Held* (affirming the decision of Denman, J.), that, though the plaintiff admitted that he would not have lent the money if he had not thought that it was to be secured by a charge on the property of the company, and there was nothing in the prospectus which would reasonably lead to such a conclusion, yet the statements as to the objects of the issue of the debentures being material mis-statements of fact on which the plaintiff had relied, the directors were liable to an action for deceit.

This was an action brought by the Rev. C. N. Edgington against the Hon. Captain Fitzmaurice, Colonel Rich, Colonel Snow, General Taylor, and Major Clench, directors of the Army and Navy Provision Market Limited, and against Mr. Hunt, the secretary, and Mr. Hanley, the manager, asking for the repayment by them of a sum of £1500, advanced by the plaintiff on debentures of the company, on the ground that he was induced to advance the money by the fraudulent misrepresentations of the defendants.

Early in November, 1880, the plaintiff, who was a shareholder of the company, received a prospectus or circular which had been issued by order of the directors, inviting subscriptions for debenture bonds to the amount of £25,000, with interest at six per cent., which contained the following statements:

The society purchased for their market, at the price of £44,500 the valuable property known as Newman's yard, comprising more than a quarter of an acre, situate in and with a frontage to Regent street. This property it held direct from the Crown, under a lease from the Commissioners of Woods and Forests, for a term of ninety-nine years from the 5th April, 1824, at a ground-rent of £196 11*s.* 1*d.*, and £15 6*s.*, 9*d.*, yearly in lieu of land tax, and subject to the half-yearly payment of £500 in redemption of a mortgage, of which £21,500 is outstanding."

It also stated that the company had expended £20,679 on the property, and £2,943 in fittings. It was stated that the object of the issue of these debentures was as follows:

"1. To enable the society to complete the present alterations and additions to the buildings, and

* S. C., 53 Law Times Reports (N. S.) 369. Reported by W. C. Biss, Esq., Barrister-at-Law.

to purchase their own horses and vans, whereby a large saving will be effected in the cost of transport.

2. Further to develop the arrangements at present existing for the direct supply of cheap fish from the coast, which are still in their infancy.

The changes contemplated in the transport service of this society are the results of past experience, which proves that dealing with contractors is not only expensive but unsatisfactory; for, the society being often at their mercy, they may almost with impunity horse the vans in such an inefficient manner as to render faulty deliveries unavoidable. With sound horses at the command of the transport department, the many evils at present inseparable from employing horses under contract will be prevented.

The society now consists of upwards of thirteen thousand members, and since the altered management the numbers have been daily increasing."

These statements were impeached in the following particulars: 1. That the statement that the property was subject to the half-yearly payment of £500 in redemption of the mortgage of £21,500 omitted the fact that on the 5th of April, 1884, the whole of the balance then due, amounting to £18,000, was liable to be called in. 2. That a second mortgage of £5,000 to Messrs. Hores and Pattison was suppressed. 3. That the object of the issue of the debentures was to pay off pressing liabilities, and not to complete the buildings or to purchase horses and vans, or to develope the business of the company. 4. That the prospectus was so framed as to lead to the belief that the debentures would be a charge on the property of the company.

The mortgage of £21,500 was a subsisting charge on the property when the society purchased; the mortgage of £5,000 was contracted by the society on the 10th of August, 1880. The first issue of debentures took place on the 18th of February, and amounted to about £8,000.

On the 8th of November the plaintiff, under the belief that the debentures would be a charge upon the Regent-street premises, inquired of Hunt whether such debentures would be a first charge on the property, and on the 10th of November Hunt replied by letter, in which he said: "The debentures will be a first charge on this property after providing for the interest payable in respect of the existing mortgage for £21,000, the redemption of which is spread over a period of twenty-one years, and it cannot be called in except at the rate of £1,000 a year." The plaintiff was also informed verbally by Mr. Hanley, the general manager, that the debenture-holders would have the security of the company's property.

The plaintiff thereupon applied for fifteen debenture bonds, and paid £1,500 to the society, and they were allotted to him on the 18th of November, 1880, and were delivered on the 19th of February, 1881.

They were in the form of a covenant by the company to pay the bearer the amount advanced with interest, and contained no charge on the property of the company.

The company was on the 22nd of July, 1881, ordered to be wound up, and the assets were only sufficient to pay the debenture-holders a small dividend.

On the 7th of July, 1882, the plaintiff commenced the present action claiming repayment of the sum advanced by him with interest, on the ground that it had been obtained from him by the fraudulent statements and omissions in the prospectus, and the fraudulent misrepresentations of Hunt and Hanley; or, in the alternative, £2,000 damages for the non-fulfilment of the agreement to give the plaintiff a charge on the property; or, in the alternative, repayment of the £1,500 advanced by him on the promise and representation that it would be secured by debentures specifically charging it on the property of the company, subject only to a mortgage then existing; whereas the debentures did not specifically charge it on any property, and were made subject to various other charges which were fraudulently concealed from the plaintiff by the defendants.

The defendants appeared separately, but their defense was substantially the same, namely, that the mortgage for £5,000 was a temporary charge only, and was intended to be paid off before the issue of the debentures, and therefore it was not considered necessary to mention it in the prospectus; that they did not know that the mortgage of £21,000 could be called in in 1884; that they had a fair expectation that they would be able to apply the money raised by the debentures for the objects stated in the prospectus, and that some of it was so expended; and that they did not authorize Hunt and Hanley to represent to intending subscribers that the debentures were to be a charge upon the property of the company. Major Clench also relied upon the fact that he had tendered his resignation on the 12th of August, 1880, and that he subsequently attended board meetings only upon special invitation.

The plaintiff, when giving evidence, alleged that he understood the prospectus as holding out that he would have a charge on the property, and that he would not have applied for the debentures unless he had understood that he was to have a charge on it; and that he relied on the fact that the company wanted the money for the objects stated in the prospectus. That he did not read the bonds when he received them, but only looked at the amounts, and that he only discovered that they did not contain a charge on the property after the winding-up.

It appeared from the minutes of the board of directors that the company was in financial difficulties both at the date of the prospectus and of the issue of the debentures; that their banking account with Messrs. Ransom, Bouverie, and Co. was overdrawn to the extent of £5,000; that the

advance by Messrs. Hores and Pattisson had been expended in altering and improving the building in which the business had been carried on; that the money raised by the debentures was, with the exception of a small part which was expended in improving the premises and in the purchase of horses and vans, applied in the payment of pressing liabilities, including the mortgage debt of £5,000 due to Hores and Pattisson.

The action was heard by Denman, J., in May, 1884.

Sir *F. Herschell* (S. G.), *Rigby*, Q. C., and *Willis Bund* for the plaintiff.

Davey, Q. C., *W. W. Karslaka*, Q. C., and *J. Kaye*, for Fitzmaurice, referred to Maddison v. Alderson, 49 L. T. Rep. N. S. 303; 8 App. Cas. 467; Jorden v. Money, 5 H. of L. Cas. 185; Ferguson v. Wilson, 15 L. T. Rep. N. S. 230; L. Rep. 2 Ch. App. 77; Peek v. Gurney. L. Rep. 6 E. & I. App. 377; Cargill v. Bower, 38 L. T. Rep. N. S. 779; 10 Ch. Div. 502; Weir v. Barnett and Bell, 38 L. T. Rep. N. S. 929; 3 Ex. Div. 238; *Ex parte* Whittaker, 22 L. T. Rep. N. S. 443; L. Rep. 10 Ch. App. 446; Clarke v. Dickson, 6 C. B. N. S. 453; Kerr on Fraud, 2nd ed. p. 35.

Crossley, Q. C., *J. Cutler*, *S Hall*, *A. Young*, *S. Brice*, and *F. A. Lewin*, for the other defendants, referred to Smith v. Chadwick, 46 L. T. Rep. N. S. 702; 20 Ch. Div. 27; Arkwright v. Newbold, 44 L. T. Rep. N. S. 393; 17 Ch. Div. 301; Eaglesfield v. Marquis of Londonderry, 35 L. T. Rep. N. S. 822; 4 Ch. Div. 693; Kennedy v. Panama and Royal Mail Company, 17 L. T. Rep. N. S. 62; L. Rep. 2 Q. B. 580.

DENMAN, J., after referring shortly to the facts of the case and expressing his opinion that no case of contract between the plaintiff and the company had been shown, if, indeed, it was alleged, proceeded:—I therefore agree with those learned counsel for the several defendants who have said that this case is substantially, as indeed the Solicitor-General admitted, reduced to, if it ever was more than, an action of I am sorry to say not a very unusual character. The ground is, that the defendants did make affirmative statements of non-existing facts as facts, which statements they knew not to be true, or recklessly stated without knowing or caring to inquire whether they were true or not, by which statements (and this would, of course, be necessary), or by them materially, the plaintiff was induced to part with his money on securities which turned out to be worthless. Unless all these things are made out the action must fail against all, or against any, of the defendants against whom they are not made out. Unfortunately for me, perhaps, I have lately had to look into this part of the law more than once in cases which are not very far from analogous to the present case, and, inasmuch as this is really a common law action when put in the way in which it is now put, it is right to formulate as well as I can, before dealing with such a case, the way in which the questions would have to be put before a jury in order that they might decide whether the cause of action is made out, taking the ruling of points of law from the judge. Now, in such a case several things would be told to the jury. They would be told that the only way in which persons could be made responsible for fraudulent misstatements in a prospectus would be first that the prospectus contained not a mere statement of a possibility or of a contingency, or of an intention as to what might occur according to the opinion of the person who is making the statement, but there must be something which amounts, in the opinion of the judge or jury (sometimes it may be for the judge and sometimes for the jury, but generally I apprehend this would be for the judge where it is upon a written document), to a statement of a fact as existing, which is not in truth existing. It will not be enough that the defendants gave a mere loose opinion, because that might be an erroneous opinion, but there must be something which, solidly looked at, is a positive statement of fact. I am putting this according to my own view of the matter as a *sine qua non*. Next it must be proved that that statement was made fraudulently. Then a jury would have the legal meaning of the word "fraudulently" explained to them, and I take it to be now established beyond all question that a statement is in the eye of the law made fraudulently not only if the person who makes it is stating something as the fact which is not the fact — absolutely telling a lie—but less than that suffices in the eye of the law. If persons who have the full means of acquiring knowledge about a particular thing, yet with the intention of inducing other people to spend their money upon that thing—especially on such a venture as a limited company—recklessly and, so to speak, in a gambling spirit, without properly inquiring into the truth or falsehood of the thing, without caring sufficiently whether it is true or false, and will or not mislead people, if such persons wilfully abstain from making inquiries and make an incorrect statement about the thing without which the money would not have been advanced, then that is in the eye of the law a fraudulent statement as much as if the persons making it had known it to be false. There is, I think, no doubt of the correctness of this doctrine, which was stated in the case of Peek v. Gurney (*ubi sup.*), and has ever since been acted upon by the common law judges in summing up to juries. If the statement is one which is false in this sense, that it is so fragmentary and so imperfect as that it must necessarily lead a person to think that to be the case which is not the case, that statement does amount sometimes, and may amount—it would be for the jury and possibly for the judge in particular cases to say whether it does or does not—to a statement fraudulently made within the meaning of those two heads of the definition. Thirdly, a jury would be told that in these cases it must be affirmatively made out that the plaintiff was ma-

terially—not solely, but materially—influenced in the purchase of the thing which turns out to be useless, or in doing the act which turns out to be disastrous, by one or more of the statements so made. All those things should be carefully laid down to any jury before they can be left to hold persons liable upon charges such as these. It is an affirmative case for the plaintiff to make out. Now, with all these conditions before me, I have to approach the evidence in this particular case, and, except as far as the action is against Hunt, I think it clear that the plaintiff's case must stand or fall upon the question whether any or all of these statements in the circular were false, and were made either with knowledge that they were false, or so recklessly as to fall within the rule of fraud arising from that kind of recklessness. As to the defendants I may say at once that it is hard to see any reason why any distinction should be drawn between them, saving the cases of Clench and Hunt, with whose cases I will deal hereafter. I mean to deal with it as a case in which the question is whether any one of three particular statements alleged to have been relied on by the plaintiff was false, and whether it was false either to the knowledge of the defendants, or made so recklessly without care whether it was true or false as to amount to the same thing. Further, whether it was made in order to induce people to subscribe, and whether in consequence of those statements or any of them (because one, if it did materially induce, would be enough) the plaintiff subscribed his money to the company, and whether he did lose his money thereby. [His Lordship then expressed his opinion that the plaintiff had not been guilty of laches, and proceeded:] Now, upon the statements of the circular, I do not think that in cases such as this it is incumbent upon the court or upon the jury necessarily to look at each statement by itself without regard to the other statements. I think one can easily suggest cases in which, taking one statement separately, you might say there is nothing in it, or that there is very little in it, or much less than there is if you couple it with the others. In all such cases, in considering the *animus* with which the statement was made, I think it is only common sense that, whether jury or judge, you should look at the whole of the document together, and consider every statement in it with a view of forming a judgment as to the intention, and that it is not a fair way of dealing with these cases to say, I take statement A., there is nothing in it; I take statement B., there is nothing in it; and I take statement C., there is nothing in it—there is nothing in them if they stood alone, and therefore, as you cannot make three nothings into something, the whole thing falls to the ground. I think you must take the whole together with its history, and then it may be that there is just reason for holding statement A., statement B., and statement C., to be all inaccurate, and all falling within the definition of an actionable false statement. There may be cases in which that is so, though, if you had only one, the decision might be quite the other way as regards that one statement. It is quite certain that you must always take into consideration the surrounding facts of the case in construing every document, and not only so, but in considering the *animus* of the parties who issue that particular document. I think it right to run through the history of this company, so far as it appears from the documents which were put in evidence in this case, especially the minutes of the meetings of the directors. [His Lordship then read passages from the minutes of the meetings of the directors, referring to them in many cases on the question whether Clench, one of the defendants, was liable. His Lordship was of opinion that in July, 1880, the state of the finances of the company was a matter of considerable anxiety, and that the company was not prosperous. There were frequent meetings, and they owed money to their bankers. In August of that year the mortgage for £5,000 was made. In August, 1880, resolutions were passed for spending £110 in repairs, and £150 on horses, and £350 for fish. In September, 1880, a proof of the circular was read at a meeting, so that in his Lordship's opinion this circular was discussed at the same time when there were considerable difficulties as to money. The defendants certainly advanced their own money, and it was said that this showed *bona fides* on their part. On the 14th of October the circular was again discussed, and again on the 19th and 28th, during all of which time the company was in great difficulties for ready money. The minutes of the subsequent meetings were only important on the question of *bona fides*. At a meeting on the 25th of November, there was a resolution to lay out £150 in the purchase of horses, as to which his Lordship rather took the view of the plaintiff, that it was absurd to suppose that for that sum they would get horses of their own. His Lordship feared that, when the circular was issued, the intention was to apply the money raised by the debentures in payment of pressing debts. No evidence had been given of the expenditure of the money in any purchase of horses. It appeared that £6,575 had been offered, and £5,500 had been received by the first December, nearly the whole of which was applied in payment of then existing debts. His Lordship then expressed his regret that the directors had not paid sufficient attention to the advice of their solicitors as to the form of the bond.] I have been, perhaps, unnecessarily minute in going through the salient points as they appeared to me, but I have done so because it appears to me that, both upon the question of the construction of the document which is impeached, and also upon the question of the conduct of the directors, and whether it can be looked upon as *bona fide* in all senses, or as impeachable on the grounds on which it is impeached, it is desirable

to look at the surrounding circumstances, and at the whole of their conduct. It is impossible to leave out any matter bearing upon the true condition of the company, or bearing upon this circular, without leaving out something which ought legitimately to be taken into account in considering the questions which are before the court. Now, having done that, I must look at the document itself. As I have already said I consider that the action is one founded on this, and this only, as it now stands: it is an allegation by the plaintiff that the directors were parties to this circular; that they published it; that it contains three specific statements which amount to statements of fact which were inaccurate and misleading and not substantially true; that they were most reckless in publishing this document with those statements, looking at either the knowledge they possessed, or the knowledge which they did not care to possess; and that the plaintiff was misled by those statements, and was induced thereby, or by some one of them, to part with his money, and that so he has lost his £1,500. The document is headed, "Six per cent. debenture bonds." When I first read these bonds I was myself under the impression—an erroneous impression I find—that there had been in the opinion of courts something to the effect that there was in the mere word "debenture" something indicating to people that the document was more than a mere promise to pay, and that it amounted to something like a charge upon the property, or the taking of the profits of the concern. That does not seem to be so, though it is said that, through certain expressions of James, L. J., in the case of *Re* Florence Land and Public Works Company, 39 L. T. Rep. N. S. 588; 10 Ch. Div. 530, there had been an impression that the mere use of the word "debenture" did imply something more than in point of law it does imply. I think, however, that it was not a very unlikely thing that the mere title of these bonds might, however erroneously, be supposed by persons in the position of the plaintiff to be a more important thing than a covenant on the part of the company to pay him principal and interest, with no power on his part, whatever might happen, to seize the property of the company at any intermediate time. But that was an erroneous view, and it is clear that, in point of law, this is nothing more than a promise to pay under the seal of the company. The document, however, contains certain statements which no doubt must be held to be made for the purpose of inducing people to take these bonds, and they are statements relating at least to the advantages of the company, and if they are not they are idle and unnecessary and irrelevant statements. If one were to speculate upon the kind of way in which such statements would be discussed at a meeting (and they certainly were discussed at many meetings by the directors, though the directors remember nothing about it), one feels as certain as if one were present at one of these deliberations that they must have considered what they should insert and what they should not insert in this circular with reference to how the public or the invited subscribers would look at it. That, I think, is made more certain by the minutes, which show how often the matter did come before the board, and how all the defendants must have had it before them from time to time, and how very important it was, at the time at which those discussions took place, that they should get the money. [His Lordship then read the first paragraph of the circular, as to which there was no complaint. But as to the statements with respect to the mortgages, his Lordship held that this would be of great importance, and that, as the circula stated what the charges were, that amounted to a statement that there were no other charges, whereas there was the mortgage for £5,000.] If so, then the case seems to fall expressly within the language which was used in Peek v. Gurney (*ubi sup.*), and which was referred to by the Master of the Rolls in Smith v. Chadwick (*ubi sup.*). It is said in answer that they contemplated that the £5,000 would be soon paid off. Suppose they had said, "subject also to a mortgage to Messrs. Hores and Pattisson, of which so many thousand pounds are still due, and which we intend to be paid immediately out of these debenture bonds." How can one for a moment say that that is not a matter which might most seriously have entered into the consideration of a person who was subscribing money upon such bonds as these? If so, is not that statement, put in that way, fragmentary, misleading, and imperfect, condescending to a particular which makes it all the more misleading? Is it not a reckless and a gambling statement in the mere hope that at some time, if they get sufficient money for these debentures, they may clear the debt away? Is it not a matter which, in all frankness and truthfulness, ought to have been stated, and which was dellberately not stated with a view of making the prospectus more taking to those who would be thinking of advancing money to the company? My view is, that it is an important omission, amounting to a mis-statement, and therefore, if the plaintiff was materially induced by that non-statement to take the debenture bonds, I think he would have a right to complain, and if he suffered by it, to recover his money back against any person who had recklessly led him astray by that kind of statement. Then, was the plaintiff induced by that statement to take the bonds? He does not expressly say he was induced partly by that statement. I do not think his words amount exactly to that. But, upon examination and upon cross-examination though he does say that if he had thought tha this document did not give a charge upon the property he should not have had anything to do with it, he said: "If it had been stated to me that there was a second mortgage on this property beyond

the £21,500 which had not been paid, and the object of the debenture was at once to be urgently gathering up the money for the purpose of paying that particular mortgage, then I should have had nothing to do with the concern." Now, it is for a jury, or any tribunal that has to draw inferences of fact, to say whether, with that evidence, and looking at the materiality of the thing, that is a matter which did tend materially to induce the plaintiff to take the debentures in question by which he has lost his money. He says that, he thought sufficiently of the importance of the thing to go to the secretary and ask the secretary whether this would be a first charge, and the secretary solemnly assured him it would. It shows that he felt it of importance, and he does say that if he had the least notion that there was this second mortgage, he should not have taken the property. I think, therefore, it was a thing which did go materially to induce him to take the debenture bonds, and in that sense also I think it was a statement of fact. That being so, I think that, on that ground alone, he would be entitled to relief. But, as I said before, I do not think it necessary to say what, supposing that had been the only mis-statement, the court might have done, because I think that each of the statements and the whole of the documents are to be looked at together. But I do hold that, even if it stood upon this alone, looking at the opinion of the Lord Chancellor in Peek v. Gurney (*ubi sup.*), and the opinion of the Master of the Rolls in Smith v. Chadwick (*ubi sup.*), where he comments on the Lord Chancellor's judgment, there was a partial and fragmentary statement calculated to deceive, and that it was a thoroughly misleading statement, though in the shape of a non-statement, and that the parties are responsible. [His Lordship then expressed his opinion that the statements as to the half-yearly payments of £500, and as to the power of calling in the balance of the mortgage for £21,500 did not show that it might be called in at the end of four years.] I think that this is so important a matter that it clearly is most material; that it ought to have been stated, and that, not being stated, it is a matter which makes this prospectus substantially incorrect. But mere inaccuracy will not affect the matter. This is a case in which the action is brought for fraud. Fraud, however, as I have said, may be committed by reckless representations, made without knowing how the matter stands one way or the other. Then does this fall within that doctrine? Upon the whole, though not so confidently as I hold upon the other matter, I think it does. I think that where five or six directors are constantly attending at meetings, constantly discussing how they can obtain advances, what mortgages they can get, who will deal with them, and whether, they shall raise debentures in a particular form from persons, shareholders or otherwise of the company, it is there bounden duty, before they send out a document such as this, to inquire and know for certain what is the effect of the document as to a matter so plain and important. The plaintiff says that if he had known that the mortgage was liable to be called in in four years, and that in the last year such a sum as £18,000 was to be at once called in, he would not have thought of lending his money to the society. And though I think that this is not quite so clear a point as the other, I do think it is sufficiently clear, and on that ground also the plaintiff has a right to say that he has been taken in and misled, and that he has been deceived by reckless statements of a gambling character made by persons who had no right to be so sanguine as they were with such difficulties about them as at that time were existing, and that on that ground also he is entitled to maintain this action. Then there is a third point. [His Lordship then read the statement as to the objects of the issue, and expressed his opinion that the intention was to tell people that the purchase of horses and carts was very important to the company, whereas there was no real expectation or intention of so laying out the money, though if all had gone on well it might at some future time have been done.] This, therefore, was illusory and misleading. Nor did it appear that anything was done as to the supply of fish. With regard to the alteration in the buildings the only evidence we have is of very slight and trifling alterations. It would have been easy of proof if there was anything serious expended, or likely to be expended. It does strike me, therefore, that these objects were inserted merely in this way: "The persons who are about to subscribe will require us to say why we want this enormous issue of debenture capital. If we have this valuable property; if we are going on so prosperously; if we have 13,000 members, and the members are daily increasing; if we have no other mortgage than the mortgage mentioned in the circular, which is not to be paid off for twenty-one and a half years, people will say, Why are you coming to us to ask for £25,000 additional capital?" And it being seen that this would be asked, the directors felt that, unless they put in some statement which would make people comfortable and satisfied as to the objects of the issue of the debentures, they would not get subscribers. Does that amount to a false statement? Is it a statement calculated to mislead to such an extent, and is it within the law a statement of a kind liable to be considered a fraudulent statement in an action for fraud against an individual? Here many points are made. One point is, that it does not state facts, but that it states intentions of the mind, and on that ground it is said it is not sufficient. Another is, that it is a mere statement of intention which does not amount to any guarantee or contract to do it, and that it might be altered at any time; that it is not a matter with which the person lending the money would have any concern; and it is also seriously argued that it was solidly and substantially true. I think myself that there is some doubt about what might be the law applicable to this kind of statement. I had

to consider it very recently with my brother Manisty in a case in the Queen's Bench Division of Bellairs v. Tucker, 13 Q. B. Div. 562. It was a different case in many respects, but there was a statement in the prospectus which was issued by the defendants in the case, that it was believed that a certain French company would be successful in substance because of the success of an English company. The English company had only very recently been established, and I think both my brother Manisty and myself had considerable doubt whether there was any dishonesty, and whether the statement of success was not a statement of a mere matter of opinion. But then the prospectus went on to say, "which English company, having only been started eighteen months, has already entered into a contract which will have a certain effect." We had the whole matter before us, and we thought that, looking to the history of the matter, and looking at the evidence in the case, this was not a statement of a fact as existing which was non-existent. But whether we were right or not, that case appears to me to be very different from the present, because the the decision in that case went on the particular facts of the case and the circumstances of those particular companies. I think that in every one of these cases it will be found that it is a very dangerous rule to take a decision in one case as a precedent on account of the great variety of facts with regard to the conduct of directors in different companies. But, looking at the facts of the present case, and at the surrounding circumstances, is this statement, "The objects of the present issue are," a false statement of a fact existing which did not exist? If it is not, then I should say the plaintiff would have no right to rely on it. But upon the whole I think it is. It has not been directly held in any of the cases cited that if the thing stated to exist is an intention of the mind, that may not be a statement of fact which is obviously and certainly false, It was said that it is idle and absurd to suppose that so small a sum as £7,000 or £8,000 would have had that effect, and that if they had got the whole £25,000 then they might set to work to perform these objects. But think that cannot be said towards any individual subscriber of the bonds. When you tell me that the objects of this issue are to enable you to complete present alterations, to purchase horses and vans, and to further develope the supply of cheap fish from the coast, that is telling me in so many words not only that such objects are in your mind, but that if I give you so much money towards that, or if 100 other subscribers give you the whole or part of the £25,000, you are able, with reasonable certainty, to employ any money subscribed on the faith of your words in doing the things which you tell me it is your object by this issue to obtain. Mellish, L.J., in *ex parte* Whittaker (*ubi sup.*), says that if it were clearly made out that at the time there was no intention to pay, he should consider that a case of fraudulent misrepresentation had been shown. I think that this statement, if not substantially false, is, looking at the whole of the case, a most reckless statement, one showing an amount of sanguineness which, if really entertained, was, under the circumstances, as against people who are asked to advance their money, of the most gambling and speculative character, and on that ground also the plaintiff is entitled to recover. I have already stated that I think that Major Clench, who played a leading part in very many of these transactions, is quite as liable as the other directors. I feel very sorry for Colonel Snow, because at one period he seems to have protested against that which I think was very wrong as regards some of the statements they were making to the subscribers. Still, wi h his eyes open, he was a party to the prospectus, and the plaintiff ought not to be deprived of such security as he may get from a judgment against Colonel Snow as well as against the others. [His Lordship then considered the case against Hunt, coming to the conclusion that he was merely a servant of the company, and was not liable, nor was Hanley. His Lordship gave judgment against the five directors for £1,500, less £45 received as interest on the debentures. As against Hunt and Hanley he dismissed the action, but without costs, as they ought to have been more cautious.]

From this decision the defendants appealed.

Davey, Q. C., *Crossley*, Q. C., and *A. Young* for the appellants, referred to Arkright v. Newbold, 44 L. T. Rep. N. S. 393; 17 Ch. Div. 301; Smith Chadwick, 50 L. T. Rep. N. S. 697; 9 Ap. Cas. 187: Jorden v. Money, 5 H. L. Cas. 185: Maddison v. Alderson, 49 L. T. Rep. N. S. 303: 8 App, Cas. 467.

Sir *F. Hershell* (S. G.), *Rigby*, Q. C., and *Willis Bund* for the plaintiff.

Davey, Q. C. in reply.

COTTON, L. J.—This case has been very fully and ably argued. It is what is called an action of deceit, the plaintiff alleging that statements were made by the defendants which were untrue, and that he had acted on the faith of these statements so as to incur damage for which the defendants are liable. In order to sustain such an action the plaintiff must show that the defendants intended that the people should act on the statements, that the statements are untrue in fact and that the defendants knew them to be untrue, or made them under such circumstances that the court must conclude that they were careless whether they were true or not. The statements in question were made in a prospectus or circular issued by the defendants for the purpose of getting subscribers to a loan, and the plaintiff alleges that he understood from them that the advances were to be secured on leasehold property of the company. In my opinion there was no good ground for his so believing. There was nothing in the prospectus to lead him to such a conclusion. The debentures were merely bonds, and the plaintiff

made no objection to their form at the time when he received them. Therefore, if the question had rested on that alone, there could be no difficulty. But it does not end there. The plaintiff also complains that the circular referred to one mortgage and stated that it was to be paid off by half-yearly instalments of £500., but did not state that the mortgage money could be demanded in a lump sum in a few years; and further, that it omitted to state another mortgage for £5,000. which was not to be paid off by instalments, but was payable in two months, I do not think it necessary to go into the consideration of these statements. As regards the first mortgage the defendants say that they had reasonable grounds for making the statement which they made, and as to the second mortgage they say that they did not mean to imply that there was no other mortgage affecting the company's property. But it is not necessary to give any decision respecting these statements, because, giving credit to the defendants for having made them fairly, there are other statements which follow, which in my opinion cannot be justified. I allude to statements respecting the objects for which the loan was effected. [His Lordship read the passage from the prospectus in which the objects of the issue of the debentures were stated, and proceeded:] It was argued that this was only the statement of an intention, and that the mere fact that an intention was not carried into effect could not make the defendants liable to the plaintiff. I agree that it was a statement of intention, but it is nevertheless a statement of fact; and if it could not be fairly said that the objects of the issue of the debentures were those which were stated in the prospectus, the defendants were stating a fact which was not true, and if they knew that it was not true, or made it recklessly not caring whether it was true or not, they would be liable. Did the defendants know or believe that the company was in a flourishing condition? I think that they must have thought that it would turn out well and that the loan could be paid back, for they had shown their confidence in the company by advancing money of their own. But the question is, whether they did not make a statement of a fact which was not correct, and which they knew to be not correct, when they stated the objects for which the loan was asked. I do not say that it was necessary to show that they intended that all the money raised should be applied in carrying out these particular objects, but certainly they ought to show that it was to be spent in improving the property and business of the company. What is the fact? The financial state of the company was openly discussed at the board meetings at which the defendants were all present, and it is clear that they were in great financial difficulties at the time. Although I should not, as I have said, have held the defendants liable merely for not referring to the second mortgage in the prospectus, yet the existence of that mortgage was strong evidence of their financial difficulties, and, considering all the other evidence and the admissions of the defendants in their cross-examination, I cannot doubt that the real object of the issue of debentures was to meet the pressing liabilities of the company and not to improve the property or develop the business of the company. I cannot but come to the conclusion that, however hopeful the directors may have been of the ultimate success of the company, this statement was such as ought not to have been made. It was said, how could those who advanced the money have relied on this statement as material? I think it was material. A man who lends money, reasonably wishes to know for what purpose it is borrowed, and he is more willing to advance if he knows that it is not wanted to pay off liabilties already incurred. But it is urged by the counsel for the appellants that the plaintiff himself stated that he would not have taken the debentures unless he had thought they were a charge upon the property, and that it was this mistaken notion which really induced the plaintiff to advance the money. In my opinion this argument does not assist the defendants if the plaintiff really acted on the statement in the prospectus. It is true that, if he had not supposed he would have a charge, he would not have taken the debentures; but, if he also relied on the misstatement in the prospectus, his loss none the less resulted from that misstatement. It is not necessary to show that the misstatement was the sole cause of his acting as he did. If he acted on that misstatement, though he was also influenced by an erroneous supposition, the defendants will be still liable. Did he act upon that misstatement? He states distinctly in his evidence that he did rely on the defendants' statements, and the learned judge found as a fact that he did, and it would be wrong for this court, without seeing or hearing the witness, to reverse that finding of the judge. We must therefore come to the conclusion that the statements in the prospectus as to the objects of the issue of the debentures were false in fact and were relied upon by the plaintiff. With respect to the defendant Clench we are not called on to express an opinion on the points in which his case differs from that of the other directors. I am not influenced by the misstatement as to the mortgage. The point on which I rely is the misstatement as to the objects of the loan in which the defendants all joined, and for which they are equally responsible. The judgment must be affirmed.

BOWEN, L. J.—This is an action for deceit, in which the plaintiff complains that he was induced to take certain debentures by the misrepresentation of the defendants, and that he sustained damage thereby. The loss which the plaintiff sustained is not disputed. In order to sustain his action he must first prove that there was a statement as to facts which was false; and, secondly, that it was false to the knowledge of the defendants, or that they made it not caring whether it was true or false. For it is immaterial whether

they made the statement knowing it to be untrue, or recklessly without caring whether it was true or not, because to make a statement recklessly for the purpose of influencing another person is dishonest. It is also clear that it is wholly immaterial with what object the lie is told. That is laid down in Lord Blackburn's judgment in Smith v. Chadwick (*ubi sup.*), but it is material that the defendant should intend that it should be relied on by the person to whom he makes it. But, lastly, when you have proved that the statement was false, you must further show that the plaintiff has acted upon it, and has sustained damage by so doing; you must show that the statement was either the sole cause of the plaintiff's act or materially contributed to his so acting. So the law is laid down in Clarke v. Dickson, 6 C. B. N. S. 453, and that is the law which we have now to apply. The alleged misrepresentations were three: First, it was said that the prospectus contained an implied allegation that the mortgage for £21,500 could not be called in at once, but was payable by instalments. I think that upon a fair construction of the prospectus it does so allege, and therefore that the prospectus must be taken to have contained an untrue statement on that point, but it does not appear to me clear that the statement was fraudulently made by the defendants. It is therefore immaterial whether the plaintiff was induced to act as he did by that statement. Secondly, it is said that the prospectus contains an implied allegation that there was no other mortgage affecting the property except the mortgage stated therein. I think there was such an implied allegation, but I think it is not brought home to the defendants that it was made dishonestly; accordingly, although the plaintiff may have been damnified by the weight which he gave to the allegation, he cannot rely on it in this action, for in an action of deceit the plaintiff must prove dishonesty. Therefore, if the case had rested on these two allegations alone, I think it would be too uncertain to entitle the plaintiff to succeed. But when we come to the third alleged misstatement, I feel that the plaintiff's case is made out. I mean the statement of the object for which the money was to be raised. These were stated to be to complete the alterations and additions to the buildings, to purchase horses and vans, and to develop the supply of fish. A mere suggestion of possible purposes to which a portion of the money might be applied would not have formed a basis for an action of deceit. There must be a misstatement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is therefore a misstatement of fact. Having applied as careful consideration to the evidence as I could, I have reluctantly come to the conclusion that the true objects of the defendants in raising the money were not those stated in the circular. I will not go through the evidence, but, looking only to the cross-examination of the defendants, I am satisfied that the objects for which the loan was wanted were misstated by the defendants. I will not say knowingly, but so recklessly as to be fraudulent in the eye of the law. Then the question remains, Did this misstatement contribute to induce the plaintiff to advance his money? Mr. Davey's argument has not convinced me that it did not. He contended that the plaintiff admits that he would not have taken the debentures unless he had thought they would give him a charge on the property, and therefore he was induced to take them by his own mistake, and the misstatement in the circular was not material, but such misstatement was material if it was actively present to his mind when he decided to advance his money. The real question is what was the state of the plaintiff's mind, and if his mind was disturbed by the misstatement of the defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a mistake himself would make no difference. It resolves itself into a mere question of fact. I have felt some difficulty about the pleadings, because in the statement of claim this point is not clearly put forward, and I had some doubt whether this contention as to the third misstatement was not an afterthought. But the balance of my judgment is weighed down by the probability of the case. What is the first question which a man asks when he advances money? It is, what is it wanted for? Therefore I think that the statement is material, and that the plaintiff would be unlike the rest of his race if he was not influenced by the statement of the objects for which the loan was required. The learned judge in the court below came to the conclusion that the misstatement did influence him, and I think he came to a right conclusion.

FRY, L. J.—I am of the same opinion. I do not think it necessary to refer to the alleged misstatements as to the mortgages, because I do not rely on that portion of the case. But with respect to the statement of the objects for which the debentures were issued, I have come to the conclusion that there was a misstatement of fact, that the statement contained in the circular was false in fact, and false to the knowledge of the defendants. Was the statement true in fact? The circular was adopted at a meeting of the board, when all the defendants were present. The financial state of the company was considered. They owed £5,000 to their bankers, and £5,000 to Hores and Pattisson. They owed large sums to tradesmen and other persons. They were under an obligation to pay £3,500 in instalments on the mortgage for £21,500 before April 1884, and they knew that if they did not pay the instalments the whole would be called in. The necessity of raising money must have been discussed at the meeting.

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It is clear that their object in raising the money was to meet their pressing liabilities. But the defendants say that the mortgage for £5,000 to Hores and Pattisson was only a temporary loan, and that the greater part of it was expended in alterations and additions to the buildings, and herefore the mortgage was merely an anticipation of the loan for the object stated in the prospectus. But the statement in the prospectus was that a large sum of money had been already expended in improving the buildings (and that included the greater part of the advance by Hores and Pattison), and that the directors intended to apply the money raised by the debentures in further improving the buildings. This statement was, therefore, false. It is not necessary to call attention to the evidence that the defendants knew at the time that a large proportion of the loan would have to be expended in paying pressing liabilities. It is hardly denied by the defendants. I come, therefore, to the conclusion with regret that this false statement was not only false in fact, but was false to the knowledge of the defendants. The next inquiry is, whether this statement materially affected the conduct of the plaintiff in advancing the money. He has sworn that it did, and the learned judge who tried the action has believed him. On such a point I should not like to differ from the judge who tried the action, even though I were not myself convinced; but in this case the natural inference from the facts is in accordance with the judge's conclusion. The prospectus was intended to influence the mind of the reader. Then this question has been raised: the plaintiff admits that he was induced to make the advance, not merely by this false statement, but by the belief that the debentures would give him a charge on the company's property, and it is admitted that this was a mistake of the plaintiff. Therefore it is said the plaintiff was the author of his own injury. It is quite true that the plaintiff was influenced by his own mistake, but that does not benefit the defendants' case. The plaintiff says: "I had two inducements, one my own mistake and the other the false statement of the defendants. The two together induced me to advance the money." But in my opinion, if the false statement of fact actually influenced the plaintiff, the defendants are liable, even though the plaintiff may have been also influenced by other motives. I think, therefore, the defendants must be held liable. The appeal must therefore be dismissed.

NOTE.—The above case, although somewhat long, is so carefully considered by judges of such deserved eminence as to justify its republication at length. It will be observed that two important questions are necessarily involved in the decision: 1. What representations in the prospectus issued by the directors of a company for the purpose of inducing the public to invest in the shares or debentures of the company will afford ground for rescinding in equity a contract of purchase induced thereby, in an action against the company, or for the recovery of damages at law for the deceit, in an action against the directors making the representation? 2. To what extent must the fraudulent representation have been the thing which induced the plaintiff to make the investment?

1. *What representations or concealments by directors, whereby a stranger is induced to purchase debentures of the company will afford ground of an action for deceit against the directors*?—At the outset, it may be stated that the right of a stranger who has been induced, by false prospectuses, or through fraudulent representations put forth by the directors or promoters of a corporation, to purchase shares therein or other debentures thereof, and who has, in consequence of such representations, sustained damage, to recover in an action at law against the persons making the representations the damage which he has thus sustained, is well settled.[1] It is true that the contract which results in the purchase of the shares or debentures is not made with the directors individually, but with the corporation; but an action for deceit may none the less be sustained against the directors. It is not an action *ex contractu*; it does not depend upon privity of contract; it is an action for damages for a simple tort.[2]

a. The Representations must have been made with an Intent to Deceive.—While this is so, the conditions which are necessary to support the action are very similar to those which underlie a proceeding in equity against the corporation for a rescission of the contract of purchase. "There can be no doubt," said Lord Chelmsford, "that equity exercises a concurrent jurisdiction in cases of this description, and the same principles applicable to them must prevail both at law and in equity."[3] Those principles have nowhere been better stated than by Lord Romilly, M. R., in *Pulsford v. Richards*,[4] where he said: "The basis of this, as well as of most of the great principles on which the system of equity is founded, is the enforcement of a careful adherence to truth in all the dealings of mankind. This principle is universal in its application to cases of contract. It affects not merely the parties to the agreement, but also those who induce others to enter into it. It applies not merely to cases where the statements were known to be false by those who made them, but to cases where statements false in fact were made by persons who believed them to be true, if in the due discharge of their duty they ought to have known, or if they had formerly known and ought to have remembered, the fact which negatived the representation made."

There is, however, this distinction between the grounds necessary to support an action against the corporation for a rescission, and those necessary to support an action for the deceit against the directors: that in the latter case the directors cannot be charged merely by showing *crassa negligentia*, or constructive

[1] Davidson v. Tulloch, 3 Macq. H. L. (Sc.) 783; Bedford v. Bagshaw, 4 Hurl. & N. 538; s. c. 29 L. J. (Exch.) 59; Scott v. Dixon, 29 L. J. (Exch.) 62, n.; Paddock v. Fletcher, 42 Vt. 389; Nelson v. Luling, 4 Jones & Sp. 544 (aff'd 62 N. Y. 645); Wontner v. Shairp. 4 C. B. 404; Jarret v. Kennedy, 6 C. B. 313; Bale v. Cleland, 4 Fost. & F. 117; Gerhard v. Bates, 2 El. & B. 476; s. c. 20 Eng. L. & Eq. 129; Thomp. Off. Corp. 158; Clarke v. Dixon, 6 C. B. (N. S.) 453; Cross v. Sackett, 2 Bosw. 617; Cazeaux v. Mali 25 Barb. 578; Morgan v. Skiddy, 62 N. Y. 319.

[2] Gerhard v. Bates, *supra*.

[3] Peek v. Gurney, L. R. 6 H. L. 377; s. c. Thomp. Off. Corp. 309.

[4] 22 L. J. Ch. 569; s. c. 17 Jur. 865; 19 Eng. L. & Eq. 387 391.

fraud;[5] it is necessary to fix them with guilty knowledge of the misrepresentation or concealment which induced the plaintiff to enter into the contract,—with what, in an action for deceit, is technically called the *scienter*.[6] The representations must not only have been false in fact, but they must have been made *with an intent to deceive*.[7] But though there is some confusion upon this point on authority, we apprehend that it is not necessary to show that the defendants knew that the representations were untrue,[8] but that it will be sufficient that it be made to appear that they made them with a fraudulent mind and motive, intending to induce the plaintiff to act as he did act, and indifferent as to whether they were true or not.[9]

b. Must Consist either in Misrepresentation of Fact or in Suppression of the Truth.—Where the action is against the corporation for a rescission, the rule is very clear that the fraud which will support the action may consist as well in a suppression of the truth as in a misrepresentation of it.[10] No reason is perceived why these principles should not apply with substantially the same force in an action against the directors for deceit. It may be conceded that if the directors make no representations of fact beyond the mere statement that a company has been organized, and has certain shares or debentures for sale, they can not be held in an action for deceit for not disclosing facts damaging to the company, which in good conscience they ought to disclose to persons whom they ask to purchase its shares. But when they put forth certain representations which are true, and which represent the company to the public in a favorable light, and, at the same time, conceal something of a very damaging nature which, if known, would prevent judicious persons from investing in its shares or debentures, they knowing that the probable effect of their affirmative representations will be to induce the purchasers to believe that the damaging circumstances do not exist, it is not perceived why their position should be different from what it would be if they had stated in terms that the damaging circumstances did not exist. They intended to deceive in a certain way, and they deceived just as they intended; and it does not seem to be material in a juridical point of view, whether they intended to deceive and did deceive by direct statement, or by indirect inference or implication. In business, as in other affairs, there is such a thing as "learning to lie with silence."

No case is recalled, however, which was an action at law for deceit, which in distinct terms bears out this statement of doctrine. The principle case comes very near to it, and we apprehend that it may fairly be cited as laying down the rule that where a man tells a lie for the purpose of concealing the truth, and the lie which he tells has that effect, a person who is damaged by reason of the fact that the lie prevented him from discovering the truth, may maintain an action for deceit therefor. Here the directors told a lie about what it was proposed to do with the money raised by the sale of the debentures,—stating that it was proposed to use them in making alterations in the premises of the company, and in developing its business. They did this for the purpose of throwing intending purchasers off their guard, and preventing them from discovering the damaging fact that the company was in a distressed condition, and needed the money to meet pressing obligations. It was what is termed in military pariance a "false attack," a "feint" or a "ruse;" and the law looks beyond the immediate means by which the deception was effected, and considers merely whether the defendants intended to induce on the part of the plaintiff a false belief in a given particular, and whether what they did had that effect. If the company had been solvent and unembarrassed, a misrepresentation as to what it intended to do with the money, would probably have been held immaterial; because statements of things to be done in the future are classed in the category of statements of opinion, belief or motive; they do not enable the purchaser of shares or debentures to avoid the contract if the thing is not done.[11] But where, as in this case, the statement of the thing to be done in the future carries with it by necessary implication an opinion of the solvency of the company, and has the probable effect of concealing an existing embarassment, this principle manifestly does not apply.

c. Purpose to Deceive the Plaintiff.—Moreover, as stated by Bowen, L. J., in the principal case, it is wholly immaterial with what object the lie is told, with this exception, that it is material that the defendant should intend that it should be relied on by the person to whom he makes it.[12] Some caution is necessary to be exercised on this point. We apprehend that it is not true that the person making the representation, in order to be liable in damages for the deceit, should have intended that it should be relied and acted upon by the particular person who brings the action; but that it is sufficient if he intended that it should be relied and acted upon by the general class of persons to which the plaintiff belongs.[13] A fraudulent prospectus or

[5] Even this was denied by as able a judge as Sir George Jessel. Eaglesfield v. Marquis of Londonderry 4 Ch. Div. 693, 704. Two other cases seem to bear out the position that moral fraud or turpitude is not necessary, in the view of a court of equity, to charge the directors, but that gross negligence in not informing themselves of the truth of the representation will be regarded as tantamount to actual fraud. Burrowes v. Lock, 10 Ves. 470; Slim v. Croucher, 1 De Gex F. & J. 518.

[6] Henderson v. Lacon, L. R. 5 Eq. 249, 262; Craig v. Phillips, 3 Ch. Div. 722, 737; Weir v. Bell, 3 Exch. Div. 238.

[7] Arthur v. Griswold, 55 N. Y. 400; Wakeman v. Dalley, 51 N. Y. 27; s. c. Thomp. Off. Corp. 299; Nelson v. Luling, 4 Jones & Sp. 544 (aff'd 62 N. Y. 645); Cazeaux v. Mali, 25 Barb. 578, 583; Evans v. Collins, 5 Q. B. 803; Shrewsbury v. Blount, 2 Man. & Gr. 475; Morgan v. Skiddy, 62 N. Y. 319; Ship v. Crosskill, L. R. 10 Eq. 73, 84, 85.

[8] See, however, Arthur v. Griswold, 55 N. Y. 400; Addington v. Allen, 11 Wend. 374; Fusz v. Spaunhorst, 67 Mo. 256, 264.

[9] Taylor v. Ashton, 11 Mees. & W. 401, 415; Leffman v. Flanigan, 5 Phila. 155, 161: Shrewsbury v. Blount, 2 Man. & Gr. 475. As to what will be a sufficient allegation of an intent to deceive, see Gerhard v. Bates, 2 El. & Bl. 476; s. c. 20 Eng. L. & Eq. 129; Thomp. Off. Corp. 158; Matthews v. Stanford, 17 Ga. 543; s. c *sub nom.* Lisson v. Matthews, 20 Ga. 848; Evans v. Collins, 5 Q. B. 804, 820; Rawlings v. Bell, 1 C. B. 951; Warner v. Daniels, 1 Woodb. & M. 91, 107; Miner v. Medbrey, 6 Wis. 295.

[10] Pulsford v. Richards, 22 L. J. Ch. 569; s. c. 17 Jur. 865; 19 Eng. L. & Eq. 387, 391; New Brunswick, &c., R. Co. v. Muggeridge, 1 Dr. & Sm. 363; Central Ry. Co. of Venezuela v. Kisch, L. R. 2 H. L. 113; Henderson v. Lacon, L. R. 5 Eq. 249, 262.

[11] Denton v. McNeil, L. R. 2 Eq. 350; Johnson v. Crawfordsville &c. R. Co., 11 Ind. 280, 285.

[12] Smith v. Chadwick, 9 App. Cas. 187; s. c. 50 L. T. (N. S.) 697; Peek v. Gurney, L. R. 6 H. L. 377 (affirming s. c. L. R. 13 Eq. 79, overruling Bagshaw v. Seymour, 18 C. B. 903; s. c. 29 L. J. (Exch.) 62,n,, and Bedford v. Bagshaw, 4 H. & N. 338; s. c. 29 L. J. (Exch.) 59, and adopting Scott v. Dixon, Id. 62,n., and Gerhard v. Bates, 2 El. & B. 476; s. c. 20 Eng. L. & Eq. 129).

[13] Wontner v. Shairp, 4 C. B. 404.

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report concocted by the directors of a company for the purpose of deceiving the public generally as to the condition of the company, with the view of inducing the public to purchase its shares, will, if seen, believed and acted upon by any member of the public, afford ground for avoiding his contract of subscription,[14] and for recovering damages from the directors for the deceit.[15] We apprehend that it is the law that if a man turns loose a lie intending that it shall catch some one, no matter whom, and induce him to act in a particular way, any one whom it chances to catch and whom it chances to induce to act in that particular way, may maintain an action against the former for the damages which he thereby sustains. But here the doctrine of proximate and remote cause comes in; and it seems to be the law that a man who publishes a lie will not be liable in an action for deceit to anyone who may be incidentally or collaterally injured by it. For instance, where the directors of a company put forth a false statement concerning its affairs, which induced A. to purchase some of its shares from B., another shareholder, it was held that B. was not entitled because of the false statement to escape liability as a contributory of the company on its being wound up by reason of insolvency; since the misrepresentations were not made to him or for the purpose of deceiving him.[16] If this is good law, as to which we confess a doubt, it would apply with equal or stronger force to an action for damages for the deceit. It may be added that it is quite unnecessary that there should have been a personal communication between the plaintiff and the defendant.[17]

2. *The Fraudulent Representation must have been a Material Inducement to the Contract.*—All the cases agree, whether the action be in equity against the corporation for a rescission, or at law against the directors for damages for the deceit, that, in order to sustain it, the fraudulent representation must have been a material inducement to the making of the contract; it must have been the thing which led the plaintiff to act as he did to his damage. Or, to borrow an expression from the civil law, sometimes used by courts of equity in cases of this kind, it must have been a misrepresentation *dans locum cantractui*, which is understood to mean a misrepresentation giving occasion to the contract—the assertion of a fact on which the person entering into the contract relied, and in the absence of which it is reasonable to infer that he would not have entered into it.[18] Another expression of this principle is that the misrepresentation must have been a proximate or immediate cause or inducement to the purchase of the shares or debentures.[19] The misrepresentation must have been in the mind of the person at the time of the negotiation for the purchase, and must have been one of the causes leading him to make the contract.[20] It is perceived that the principal case decides that it need not have been the *sole* inducement. The fraudulent representation was one inducement, and the plaintiff's mistake of fact was another inducement; nevertheless the defendants were held liable. In this regard the principal case applies the rule which had been previously laid down in Clarke v. Dickson,[21] and in several cases in equity where the right of the purchaser of shares to avoid the contract was under consideration,[22] and which has been laid down in America in actions for deceit.[23] It is manifest that care will be required in any case to prevent a misapplication of this distinction. Two causes induced the plaintiff to make the contract whereby he suffered the damage; for one of them the defendants are responsible, for the other they are not. It does not follow, upon this mere statement, that the plaintiff can recover his damages of the defendants. If the cause for which the defendants are responsible possessed so little controlling influence over the plaintiff that of itself it would not have induced him to make the purchase, it seems to be a fair conclusion that the defendants ought not to be held liable.[24]

St. Louis, Mo. SEYMOUR D. THOMPSON.

[14] Ayres' Case, 25 Beav. 513. Compare *ex parte* Worth, 4 Drew. 529; *ex parte* Brigg, L. R. 1 Eq. 483.

[15] Davidson v. Tulloch, 2 Macq. H. L. (Sc.) 783; Bartholomew v. Bentley, 15 Ohio, 659; Cazeaux v. Mali, 25 Barb. 578, 583; Cross v. Sackett, 2 Bosw. 618; Clarke v. Dickson, 6 C. B. (N. S.) 453; Bedford v. Bagshaw, 4 Hurl. & N. 538; s. c. 29 L. J. (Exch.) 59; Scott v. Dixon, 29 L. J. (Exch.) 62, *n.*; Morgan v. Skiddy, 62 N. Y. 319.

[16] *Ex parte* Worth, 4 Drew. 529. Compare *ex parte* Brigg, L. R. 1 Eq. 483.

[17] Clarke v. Dickson, 6 C. B. (N. S.) 453; Bedford v. Bagshaw, 4 Hurl. & N. 538; s. c. 29 L. J. (Exch.) 59.

[18] Pulsford v. Richards, 22 L. J. Ch. 569; s. c. 17 Jur. 865; 19 Eng. L. & Eq. 387, 391.

[19] Sir W. Page Wood, V. C., in Barry v. Croskey, 2 Johns. & Hem. 1. 25.

[20] Lord Cranworth in Western Bank of Scotland v. Addie, L. R. 1 H. L. (Scotch) 145, 158.

[21] 6 C. B. (N. S.) 453.

[22] Western Bank of Scotland v. Addie, *supra*; Lord Cranworth in Nicol's Case, 3 De Gex & J. 420.

[23] Morgan v. Skiddy, 62 N. Y. 319 (affirming s. c. 4 Jones & Sp. 152); Arthur v. Griswold, 55 N. Y. 490. The same principle governs in actions for damages for negligent acts. Thus, if A. is guilty of a negligent act, and B. is guilty of another negligent act and these two acts, combining together, result in an injury to C., C. may maintain an action either against A. or B. Burrows v. March Gas & Coke Co., L. R. 5 Exch. 67; s. c. 7 Exch. 96; 2 Thomp. Neg. 1070; Eaton v. Boston etc. R. Co., 1 Allen, 500; Illidge v. Goodwin, 5 Car & P. 190; Lynch v. Nurdin, 1 Q. B. 29; Lockhart v. Lichtenthaler, 46 Pa. St. 151; McCahill v. Kipp, 2 E. D. Smith, 413; Peck v. Neil, 3 McLean, 26; Smith v. Dobson, 3 Scott N. R. 336; Congreve v. Morgan, 18 N. Y. 84; Irwin v. Fowler, 5 Robt. 482; Ricker v. Freeman, 50 N. H. 420; Wheeler v. Worcester, 10 Allen, 591; Chapman v. New Haven etc. R. Co., 19 N. Y. 341; Colgrove v. New York etc. R. Co., 20 N. Y. 492; Barrett v. Third Avenue R. Co., 42 N. Y. 628; McMahon v. Davidson, 12 Minn. 357; Griggs v. Flickenstein, 14 Minn. 81, 93; Philadelphia v. Weller, 4 Brewst. 24; Carpenter v. Central Park R. Co., 11 Abb. Pr. (N. S.) 416.

[24] Where the person who was induced to purchase the shares of the company knew as much about its affairs as the directors who put forth the false prospectus, it was held, on ground somewhat like those stated in the text, that he was not entitled to a rescission. Jennings v. Broughton, 22 L. J. Ch. 585; s. c. 17 Jur. 905; 19 Eng. Law & Eq. 420. To the same effect is Salem Mill Dam. Corp. v. Ropes, 9 Pick. 187, 197.

WEEKLY DIGEST OF RECENT CASES.

1. DEED. [*Words of Inheritance.*]—*Reservation of an Easement without Words of Inheritance Reserves only a Life Estate.*—In a deed to an individual the word "heirs" is necessary to create an estate of inheritance in the grantee if he takes to his own use and not in trust. Therefore reservation in a deed by a grantor reserving an easement or servitude to himself to pass and repass over the land conveyed, but without any words of inherit-

ance, creates only a life estate in the easement. The opinion of the court by Morton, C.J., is as follows: "The defendant claims a right of way over the plaintiff's lot under the deed from Merrifield to Cobleigh. This deed contains the following clause: 'Reserving, however, to myself the privilege of a bridle road in front of the house.' The question in the case is not whether the easement thus created was appurtenant to the land retained by the grantor, but rather what was its duration. Dennis v. Wilson, 107 Mass. 591. It is a settled rule that in a deed to an individual the word 'heirs' is necessary to create an estate of inheritance in the grantee, if he takes to his own use and not in trust. Buffum v. Hutchinson, 1 Allen, 58; Sedgwick v. Laflin, 10 Id. 430; Curtis v. Gardner, 13 Metc. 457; Jamaica Pond Aqueduct Corporation v. Chandler, 9 Allen, 159; Ashcroft v. Eastern R. R., 126 Mass. 196. When a clause in a deed is strictly an exception, taking out of the grant some portion of the grantor's former estate, the part excepted would remain in the grantor as of his former title, because not granted. But when the effect of the clause is to create some right or easement, not before existing, it is, properly speaking, a reservation, and is generally considered as operating by way of an implied grant. In the case at bar, Merrifield, while he was the owner of the lots now held by the plaintiff, and the defendant, had the right to pass and repass over any part of his estate, but no right of way, properly speaking, existed over the plaintiff's lot. This easement, or servitude, in favor of the lot, retained by Merrifield, was a new interest in real estate, created by the reservation and its acceptance by the grantee in the deed. As the reservation contains no words of inheritance, it follows, according to the authorities cited above, that Merrifield had only a life estate in the easement, and that the ruling of the superior court was correct."] *Bean v. French*, S. C. Mass., October 24, 1885; 2 Eastern Repr. 734.

2. EMINENT DOMAIN.—*Removal of Buildings by Owner before Compensation Paid.*— Until compensation is paid there is no right of entry in the party seeking to condemn property; until that time the company seeking condemnation has the right to abandon the location and adopt another. So, until the selection by the company becomes binding, the owner may exercise all the rights of ownership not materially interfering with the condemnation proceedings, and so may remove machinery and buildings from the premises sought to be condemned. In the opinion of the court, given by Scholfield, J., it is said: "We have held that, until the compensation is paid, there is no right to enter upon the premises; that, until that time, the company seeking condemnation has the right to abandon the location and adopt another. St. Louis & S. E. R. Co. v. Teters, 68 Ill. 144; Chicago & I. R. Co. v. Hopkins, 90 Ill. 317; Chicago v. Barbian, 80 Ill. 482; South Park Com'rs v. Dunlevy, 91 Ill. 49. We cannot, therefore, hold, as counsel for appellant contend should be held, on the authority of Muller v. Earle, 35 N. Y. Superior Ct. 472, that the filing of the petition to condemn was such an appropriation of the building that appellants could not lawfully remove them. As we said in Chicago v. Barbian, *supra:* 'The rights of the parties are correlative and have a reciprocal relation,—the existence of the one depending on the existence of the other. When the party seeking condemnation acquires a vested right in the property, the owner has a vested right in the compensation; but since no vested right can be acquired in the property, without the owner's consent, until compensation shall be paid, it must follow there can be no vested right in the compensation until after the amount is paid.' This was quoted with approval in South Park Com'rs v. Dunlevy, *supra*. Quite clearly, so long as the company is not bound to the location, but may change it and adopt another, the land-owner cannot be bound. He may, until the selection by the company becomes binding, do any act that an owner may do with his own, not materially interfering with the condemnation proceedings, and the object sought to be accomplished thereby. From this it must follow that appellants were at perfect liberty to enter upon the premises at any time before the expiration of the lease on the fifteenth of December, 1883, and remove their machinery and buildings, assuming, as they claim, that the latter falls within the description of 'trade fixtures.' It did not require, as seems to be supposed, notice, to terminate the lease on the fifteenth of December, 1883. Our statute provides that 'when the tenancy is for a certain period, and the term expires by the terms of the lease, the tenant is then bound to surrender possession, and no notice to quit or demand of possession is necessary.' § 12, cap. 80, Rev. St. 1874. It does not appear that there was any covenant of renewal, and hence, at the time the petition was filed, the only rights the tenants had were to enjoy the unexpired term and remove their fixtures."] *Schreiber v. Chicago, etc. R. Co.*, S. C. Ill., Nov. 14, 1885; 3 North E. Repr. 427.

3. EVIDENCE. [*Admissions in Pleadings.*] *Averments under Oath in a Pleading in Another Suit Admissible.*—Averments made under oath, in a pleading in an action at law, are competent evidence in another suit against the party making them; and the fact that the averments are made on information and belief goes only to their weight, and not to their admissibility as evidence. [In the opinion of the court by Mr. Justice Woods, it is said: "When a bill or answer in equity or a pleading in an action at law is sworn to by the party, it is competent evidence against him in another suit as a solemn admission by him of the truth of the facts stated. Studdy v. Sanders, 2 Dowl. & R. 347; DeWhelpdale v. Milburn, 5 Price, 485; Central Bridge Corp. v. Lowell, 15 Gray, 106; Bliss v. Nichols, 12 Allen, 443; Elliott v. Hayden, 104 Mass. 180; Cook v. Barr, 44 N. Y. 156; Tayl. Ev. (7th Ed.) § 1753; Greenl. Ev. §§ 552, 555. When the averment is made on information and belief, it is nevertheless admissible as evidence, though not conclusive. Lord Ellenborough in Doe v. Steel, 3 Camp. 115. The authority cited sustains the proposition that the fact that the averment is made on information and belief merely detracts from the weight of the testimony. It does not render it inadmissible. The charge given by the circuit court on this point, therefore, deprived the plaintiffs in error of no advantage to which they were entitled."] *Pope v. Allis*, Sup. Ct. U. S., Nov. 9 1885; 6 Sup. Ct. Repr. 69.

4. ——— [*Depositions before Coroner.*] *Not Admissible in a Civil Action.*—In an action for damages for an injury received in a railway accident, the deposition of a deceased witness taken at a coroner's inquest is not admissible. In giving the opinion of the court on this point, Sheldon, J., says: "English cases are cited where such deposi-

tions have been held admissible in evidence. Starkie, in remarking upon this subject, observes: 'It has been said that depositions taken by a coroner are evidence although the prisoner was not present, because the coroner is a public officer appointed to inquire of such matters, and therefore it is to be presumed that such depositions were fairly and impartially taken: yet it seems the admissibility of these depositions stands altogether upon the statutes,' etc. 2 Starkie, Ev. 490, marg. As quoted from 2 Phil. Ev. 224, marg., Cow. & H. notes, (5th Amer. Ed.); 'The fourth section of the 7 Geo. IV, c. 64, enacts that every coroner, upon any inquisition before him taken, whereby any person shall be indicted for manslaughter or murder, * * * and shall certify and subscribe the same evidence, and all such recognizances, and also the inquisition before him taken, and deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court. * * * It has been held in the construction of the statute of Philip and Mary, under which depositions before coroners used to be taken, (and the same decisions seem to apply to cases under the new statute above cited,) that in case of any of the witnesses * * * are dead, * * * their depositions may be read on the trial of the prisoner.' The provision of our statute simply is, 'which testimony (before coroner) shall be filed with said coroner in his office and carefully preserved.' There being no implication, as in the English statute, that the inquisition is for use in court. There is such difference between the statutes as to afford room for question whether the English decisions fully apply. The cases in which such depositions have been received are mostly criminal cases, but they have been received in a civil case. Sills v. Brown, 9 Car. & P. 601. The plaintiff was not a party to the proceeding before the coroner, was not present, had no opportunity for the cross-examination of the witness, and any question of negligence, the vital question in this case, was not the very matter of inquiry before the coroner. The legitimate object of the inquest would have been fulfilled in finding simply that the death of deceased was caused by his being run over by a railroad train, without inquiry whether it was through any one's, or whose, negligence. We are of opinion the deposition was rightly excluded. In the case of Cook v. New York Cent. R. Co., 5 Lans. 401, it was so ruled, and see State v. Turner, Wright, (Ohio,) 21, and note to above citation from Phillips."] *Pittsburgh etc. R. Co. v. McGrath*, S. C. Ill., Nov. 14, 1885; 3 North. E. Repr. 439.

5. MUNICIPAL BONDS. [*Bona Fide Purchaser.*] *Purchaser must risk Genuineness of Signature and official Character.* Purchasers of municipal securities must always take the risk of the genuineness of the official signature of those who execute the paper they buy, and this includes not only the genuineness of the signature itself, but the official character of him who makes it. [In the opinion of the court by Mr. Justice Field, it is said: "There was evidence at the hearing of a very persuasive character that the 78 bonds deposited with the bank on the 28th of September, 1878, when the two loans of Bogert were consolidated, were not signed by him, and that the seal of the county was not attached until after he had ceased to be collector. Our judgment leads to that conclusion. If this be the fact, they fall within the rule in Anthony v. County of Jasper, 101 U. S. 699, where the court said that 'purchasers of municipal securities must always take the risk of the genuineness of the official signature of those who execute the paper they buy. This includes not only the genuineness of the signature itself, but the official character of him who makes it.'"] *Merchant's Exch. Na Bk v. Board of Chosen Freeholders*, Sup. Ct. U. S., Nov. 16, 1885; 6 Sup. Ct. Repr. 88.

6. ——— ———. *Purchaser must risk Existence of Power to Issue.*—Where a county board has no power to issue bonds, except as specially delegated for a particular purpose, all persons taking the bonds must see to it that the conditions prescribed for the exercise of the power existed. In the opinion of the court by Mr. Justice Field it is said: "In the view we take of this case, it is not material whether the bonds were signed before or after Bogert had ceased to be collector. The board of chosen freeholders of the county never directed nor permitted their issue. The law under which it derived all its powers provided only for the issue of bonds to meet the indebtedness from those then about to mature. All such maturing bonds had been surrendered for the new bonds, except for a small amount, which was paid in cash. The power of the board under the law was then exhausted. Any further issue was beyond its authority. Unless, therefore, there is something in connection with their issue to estop the board from contesting their validity, they can in no manner bind the county. This is not a case where there existed in the board a general power to issue negotiable securities of the county, so that parties would be justified in taking them when properly executed in form by its officers. It is a case where there was no power, except as specially delegated by law for a particular purpose. All persons taking securities of municipalities having only such special power must see to it that the conditions prescribed for the exercise of the power existed. As an essential preliminary to protection as a *bona fide* holder, authority to issue them must appear. If such authority did not exist, the doctrine of protection to a *bona fide* purchaser has no application. This is the rule even with commercial paper purporting to be issued under a delegated authority. The delegation must be first established before the doctrine can come in for consideration. See case of Floyd Acceptances 7 Wall. 676; Marsh v. Fulton Co., 10 Wall. 676; Mayor v. Ray, 19 Wall. 469. There is a class of cases where recitals in obligations are held to supply such proof of compliance with the special authority delegated as to preclude the taking of any testimony on the subject, and estop the obligor from denying the fact. These have generally arisen upon municipal bonds, authorized by statute, upon the vote of the majority of the citizens of a particular city, county, or town, and in which certain persons or officers are designated to ascertain and certify as to the result. If, in such cases, the bonds refer to the statute, and recite a compliance with its provisions, and have passed for a valuable consideration into the hands of a *bona fide* purchaser, without notice of any defect in the proceedings, the municipality has been held to be estopped from denying the truth of the recitals. The ground of the estoppel is that the officers issuing the bonds and inserting the recitals are agents of the municipality, empowered to determine whether the statute has been followed, and thus bind the municipality by their determination. See, of the late cases on this point, Northern Bank of Toledo v. Porter Township Trustees, 110 U. S.

608; s. c. 4 Sup. Ct. Rep. 254; and Dixon Co. v. Field, 111 U. S. 83; s. c. 4 Sup. Ct. Rep. 315. In the bonds of Bergen county there are no recitals. The bank, in taking them, was bound to ascertain whether or not they were authorized. Had it examined the register of the bonds issued to take up the matured bonds, which was a public record of the county and open to inspection, it would have learned that the bonds which it received were not of the number thus authorized. Content to rely upon the unsupported representations of Bogert, it cannot now cast upon the county the consequences of its own mistake. Buchanan v. Litchfield, 102 U. S. 278."]—*Ibid.*

CORRESPONDENCE.

INTERSTATE GARNISHMENTS AND EXEMPTION LAWS.

To the Editor of the Central Law Journal:

I have read with interest the articles that have appeared in the JOURNAL, in reference to "Inter-state Garnishment and Exemption Laws" as it is a subject that we frequently have to deal with here.

The customary manner of procedure here, is for the party having a claim against a person who is working for a corporation doing business in two or more States, to place the claim in judgment here, and assign the judgment to some person living, say in Missouri or Illinois. The assignee then takes a transcript of the judgment and garnishes the corporation in the State of his residence.

Can you suggest any method by which the exemption laws can have the force and effect intented, in such cases? LA MONTE COWLES.

Burlington, Iowa.

[We cannot, but perhaps some of our learned readers can. The case has some analogy to cases where fictitious transfers of causes of action are made to citizens of other States in order to give jurisdiction to the Federal tribunals, which transfers, we understand, where the facts are shown, are treated as frauds in the jurisdiction of the court. If the courts of last resorts do not see their way clear to make some rule that will meet the exigency, the legislatures plainly ought to take the matter in hand.—ED. C. L. J.]

QUERIES AND ANSWERS.*

[Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.]

QUERIES.

14. SELLING LIQUOR TO A MINOR.—Indictment by grand jury for selling liquor to "a minor without the written order of his parent, guardian or family physician" under the statute of Illinois, which reads: "Whoever, by himself or his agent or servant, shall sell or give intoxicating liquor to any minor without the written order of his parent, guardian, or family physican, * * * * shall be fined," etc. The liquor was sold to the minor several months prior to the finding of the bill of indictment. A few days after the indictment was returned into court, A. went to the father of the minor and purchased from him a written order to sell his boy liquor, and the order was dated to cover the period when the liquor above named was sold to the minor. Will this written order be a good defense on the trial of A. under the indictment? H.

QUERIES ANSWERED.

Query No. 11. [22 Cent. L. J. 45.]—IS A PLATFORM SCALE A FIXTURE?—A. is the owner of forty acres of land used for farming and such stock raising as is generally incident to such a farm in Missouri. On said farm he places a platform scale, attached to the soil by making an excavation and setting posts in the ground, and thus setting the scales—not on a brick or stone foundation. A. then sells the farm to B. by warranty deed. A. afterwards removes the scales, claiming them as personal property. Did the scales constitute a part of the realty and pass to B., the igrantee, or were they personal property? Cite authorties. CONSULTUS.

[Consult us about some easier question.—ED. CENT. L. J.]

Answer. We think the following authorities settle this question: Arnold v. Crowder, 81 Ill. 56; s.c., Am. Rep. 260; s. c., 3 Cent. L. J. 658. The intention of the parties at the time of placing such property upon the realty will often be decisive of this question. It makes no difference whether the scales were placed upon wooden posts or a rock or brick foundation. See State Saving Bank v. Kercheval, 65 Mo. 682. Of course much will depend upon the relation of the parties to a suit of this kind. The rule that property attached to the land becomes a part of the realty is more rigorously enforced where the relation of vendor and vendee exists than where the parties sustain to each other the relation of landlord and tenant. In view of the authorities above cited, we would not hesitate to say that the scales constituted a part of the realty and passed with it, unless there were circumstances surrounding the transaction that made it an exception to the rule. PATTON, CRANOR & AUSTIN.

Albany, Mo.

Query No. 12. [22 Cent. L. J. 45.] LIABILITY OF SURETIES ON BOND OF TREASURER OF BENEVOLENT SOCIETY.—A. was elected treasurer of an association in 1884, gave bond and received from his predecessor the funds, by a check on the bank where they were kept. He mingled these with his own funds, deposited in the same bank, and in the course of a years dealings drew out the entire amount, leaving nothing to his credit. He was then re-elected treasurer, and gave a new bond with different sureties; in his second term he failed to honor the drafts of the association and was removed, and suit was brought against him and the sureties on his second bond for a conversion of the associations' funds. Was the fact that he had drawn from the bank all of the company's funds, not for its uses or to meet its drafts, during his first term, evidence of a conversion sufficient to release the sureties on the second bond, it not appearing, other than by his report made at the time they signed the bond, that he had the company's funds on hands? Is it enough for the second set of sureties to show that he had no money in bank at or since the beginning of his second term? Would that be *prima facie* evidence of a misapplication during the first term?

Answer.—If the second set of sureties can show that A. had no funds of the association when or after they became such they will escape liability and the sureties for the first term must pay. "It is a universal rule that sureties are only liable for the default of their principal during the term for which their bond was

given and after it was given, unless retrospective in terms:" "Where an officer in this own successor his sureties for either term are bound for him and should be liable precisely as though the principal had succeeded some other person instead of being his own successor: Each set is required to account for all the public money that came to his hands during their term." Southerland on Damages, volume 2, pp. 23-4. Many cases are cited in the notes. If you are not in possession of the work the case of Jones v. U. S., 7 Howard, 681, which Mr. Southerland cites, will probably be sufficient for you.

Chattanooga, Tenn. H. M. WILTSE,

JETSAM AND FLOTSAM.

THE RIGHT BOWER OF TRUMPS.—[*Ed. Jetsam and Flotsam*].—The present Chief Justice Campbell of Michigan, once captured an audience in a court case of great interest, by a witty reply. He was opposed by Alex. Fraser, a very able and dignified counsel, and was himself a fine advocate, Mr. Frazer began fencing with the jury early in his speech by saying that his learned associate had been suddenly called away, leaving him in a strange position, and whereas he had expected to merely follow suit, he found himself a sort of a right bower of trumps as it were—then halting a moment, he turned toward Campbell and facetiously added: "I suppose my learned brother Campbell don't understand much about right bowers and trumps, he being such an excellent Sunday-school teacher! "O, yes I do," retorted Campbell, quickly, "I always knew that a right bower was the biggest knave in the pack!" This little turn greatly aided Campbell in winning a verdict. The laugh could never be reversed.

J. W. DONOVAN.

[Is it not a striking commentary on the value of jury trials that the result of a solemn judicial proceeding can be influenced by a joke?—*Ed. Jetsam and Flotsam.*]

LEVEL HEADED.—The CENTRAL LAW JOURNAL is enjoying quite a lengty symposium with its subscribers, in discussing the subject of how to conduct a legal paper. The difference of opinion expressed is very striking, and in many cases amusing. A legal newspaper should be what it professes to be, a newspaper, giving all sorts of news that may interest the profession. There are too many mere reporters, too few good legal newspapers.—*Columbia Jurist.*

CALIGULA MASSACHUSETTS.— The *Boston Law Record* of December 29th, says: "For the present the publication of the current opinions of the Supreme Judicial Court for the Commonwealth is denied in any form to this and other publications, and until there is a modification of this order we are debarred from publishing the abstracts of the opinions."

ONLY ONE PLAIN MISTER.—The Judge calling the attorneys on motion day: "Judge ——! Gen. ——! Maj. ——! Judge ——! Col. ——! Gen. ——! Judge ——! Col. ——! Judge ——! (With a sigh of relief)—Mr. ——!"—*Louisville Courier Journal.*

GIFTS CAUSA MORTIS.—In the *Western Reporter* (Vol. 1, p. 502) the printer has mixed up the Latin of the learned editor in the following manner: "These facts do not show such a delivery as constitutes a valid gift *causa* notes and their proceeds as against the *mortis*." The printer or proof reader who perpetrated that on Mr. Desty had better get out his mallet and chisel and *mortis* a little more, and then quit.

FEDERAL LEGISLATION AGAINST LOTTERIES.—[Washington, Jan. 8.] Senator Wilson, of Iowa, today reported favorably from the Committee on Post Office and Post Roads, the bill introduced by him to prohibit the mailing of newspapers and other publications containing lottery advertisements. The report says that the several States have acted resolutely and with marked unanimity in their endeavors to suppress the malign presence of the lottery. Louisiana stands almost alone in toleration of the evil and she has pronounced against it after 1895. Vermont and Delaware qualify their prohibition by allowing such lotteries as may be authorized by their own laws while denouncing those recognized by the laws of other States. It is the purpose of the bill to aid the States in their efforts to suppress the crime. It is intended to close the United States mail against the transmission of lottery advertisements of every kind and character. "Without some law," the report continues, "the insidious temptations contained in the cunningly devised lottery advertisements will continue to invade every State, family, shop and office, every place of business or of pleasure, or public and private resorts, in spite of the efforts which the States have made to prevent it."

TOO EAGER IN CROSS-EXAMINING. — Witness. — "Yes, sir. He struck me on the bridge—"

Lawyer (sharply interrupting)—"How is that? You said awhile ago that he struck you on the balcony?"

Witness—"So he did, sir. I'm tellin' you no lie."

Lawyer—"Did he strike you more than once?"

Witness—"Only once, sir. Begorra, I was quite satisfied."

Lawyer—"How then could he strike you on the bridge and on the balcony at the same time and with one blow?"

Witness—"Anyhow, he did, sir."

Judge (interfering)—"On what balcony?"

Witness—"The balcony of the hotel, Your Honor."

Judge—"And on what bridge?"

Witness—"The bridge of my nose, sir. Had the spalpeen waited I'd a told him."—*Buffalo Express.*

IMPRISONMENT FOR DEBT.—A New York paper that is trying to abolish imprisonment for debt says: "The story of William C. Cooper, who is without a dollar in the world, and who is confined in Ludlow street jail because he is unable to pay his divorced wife a fee for her counsel and $7 a week alimony, should stir to renewed action the humane people who are determined to put an end to that style of barbarism in the Empire State." It is sad, perhaps, but if Mr. Cooper is so hard up as all this he is probably as well off in jail as anywhere else, and if his ex-wife has that tendency to pull hair, scratch and bite that a failure to pay alimony has been known to develop, he is a good deal better off.—*Chicago Times.*